STATE OF NORTH CAROLINA HAYWOOD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 233
DAVID WIJEWICKRAMA; MELISSA JACKSON; and RONALD L. MOORE, Plaintiffs, v. DONALD BRANDON CHRISTIAN, Defendant.	**ORDER AND OPINION ON CROSS-MOTIONS TO DISMISS AND DEFENDANT'S MOTION TO STRIKE**

1. This action involves a contentious fee dispute among four North Carolina attorneys who successfully sued the Cherokee County Department of Social Services ("Cherokee County DSS"), its director, and others for alleged misconduct that allegedly harmed many families and children.[1]

2. Before the Court for decision are three motions: (i) Defendant's Motion to Strike[2] pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), (ii) Defendant's Motion to Dismiss[3] pursuant to Rule 12(b)(6) (together with the Motion to Strike, the "Defendant's Motions"), and (iii) Plaintiffs' Motion to Dismiss Counterclaims[4] pursuant to Rule 12(b)(6) ("Plaintiffs' Motion to Dismiss";

[1] (Compl. ¶ 15, ECF No. 2.)

[2] (ECF No. 9.)

[3] (ECF No. 10.)

[4] (ECF No. 22.)

together with Defendant's Motion to Dismiss, the "Motions to Dismiss"; collectively with Defendant's Motions, the "Motions").

3. After considering the Motions, the parties' briefs in support of and in opposition to the Motions, the relevant pleadings, and the arguments of counsel at the hearing on the Motions, the Court hereby **GRANTS in part** and **DENIES in part** the Motions as set forth below.

The Van Winkle Law Firm, by Philip S. Anderson and Ronald K. Payne, for Plaintiffs-Counterclaim Defendants David Wijewickrama, Melissa Jackson, and Ronald L. Moore.

Seiferflatow, PLLC, by Mathew E. Flatow and Brandon T. Forbes, for Defendant-Counterclaim Plaintiff Donald Brandon Christian.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

4. The Court does not make findings of fact on a motion to dismiss under Rule 12(b)(6) or a motion to strike under Rule 12(f). The Court recites the allegations asserted and documents referenced in the pleadings that are relevant to the Court's determination of the Motions.

5. Plaintiffs David Wijewickrama ("Wijewickrama"), Melissa Jackson ("Jackson"), and Ronald L. Moore ("Moore"; collectively with Wijewickrama and Jackson, "Plaintiffs") and Defendant Donald Brandon Christian ("Defendant" or "Christian") are all attorneys licensed to practice law in North Carolina.[5]

[5] (*See* Compl. ¶ 14.)

6. In 2017, Wijewickrama and Jackson undertook the representation of a number of families and children who alleged that the improper activities and conduct of the Cherokee County DSS, its director, and others had harmed them.[6] In light of the number of plaintiffs involved, Wijewickrama and Jackson engaged Moore and Christian to assist in the representation pursuant to a written "Co-Counsel Agreement for Representation for Cherokee County DSS Cases" (the "Co-Counsel Agreement" or the "Agreement") dated 20 December 2017.[7]

7. The Agreement provided that, as co-counsel, Plaintiffs and Defendant would "have equal input and participate equally in strategy, preparation and review of documents, attendance in Court for hearings and trial and any settlement discussions."[8] The Agreement went on to state that "[e]ach lawyer ha[d] equal

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[6] (Compl. ¶ 15.)

[7] (Compl. ¶¶ 16–20.) The Co-Counsel Agreement has not been filed by either side, but Plaintiffs assert that the Agreement has been reproduced verbatim in paragraph 20 of the Complaint. (*See* Pls.' Br. Opp'n Def.'s Mot. Dismiss 6, ECF No. 20; Compl. ¶ 20.) The Supreme Court of North Carolina has approved Plaintiffs' approach, noting that

> [t]here is no rule which requires a plaintiff to set forth in his complaint the full contents of the contract which is the subject matter of his action or to incorporate the same in the complaint by reference to a copy thereof attached as an exhibit. He must allege in a plain and concise manner the material, ultimate facts which constitute his cause of action[.]

RGK, Inc. v. U.S. Fid. & Guar. Co., 292 N.C. 668, 675 (1977). Thus, citations to the Co-Counsel Agreement will be to the Agreement's provisions as identified within paragraph 20 of the Complaint. *See also Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203–04 (2007) (stating that documents attached to and incorporated within a complaint become part of the complaint and may properly be considered on a 12(b)(6) motion).

[8] (Co-Counsel Agreement Art. 1(a).)

standing and presence within the team[ ]" and "an equal vote on all matters."[9] The Agreement further delineated specific duties for each lawyer. Jackson was designated as lead civil counsel.[10] Wijewickrama was to be the case manager and "assist in managing all information, data, experts, private investigators and other resources as they are needed."[11] And Christian's role was to "assist in research, motion preparation and [provide] any assistance as needed[.]"[12] In addition to designating these individual responsibilities, the Agreement also provided that each attorney was to "assist in all civil matters and other issues as they arise."[13]

8. The fee sharing provision in the Agreement provided that "[p]resumptively, co-counsel shall divide fees equally, which at this time, is 1/4 each."[14] The Agreement also provided, however, that "[i]f attorney's fees are recovered, co-counsel shall be reimbursed for monies paid with the remainder going to attorneys based on percentage of time in the case."[15]

9. Of critical importance here, the Agreement permitted each lawyer to "opt out at any time during the course of the litigation, appeal or other proceeding." But

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[9] (Co-Counsel Agreement Art. 1(a)(ii), (c).)

[10] (Co-Counsel Agreement Art. 1(a)(iii).)

[11] (Co-Counsel Agreement Art. 1(a)(v), (vii).)

[12] (Co-Counsel Agreement Art. 1(a)(vi).)

[13] (Co-Counsel Agreement Art. 1(a)(iv).)

[14] (Co-Counsel Agreement Art. 2(d).)

[15] (Co-Counsel Agreement Art. 2(c).)

"[u]pon Opt-Out, any lawyer [would] be entitled to a billable hour of work done at the rate of $300 per hour." The Agreement provided that "[u]ntil such Opt-Out occur[red], each lawyer shall be treated equally."[16]

10. Following the Agreement's execution, Plaintiffs and Defendant pursued litigation in federal district court against Cherokee County DSS on behalf of numerous plaintiffs.[17] The lawsuits relevant to the Motions include: *Cordell v. Cherokee Cnty.*, No. 1:20-CV-199 (W.D.N.C. 2022), *Cordell v. Cherokee Cnty.*, No. 1:20-CV-201 (W.D.N.C. 2022) (together, the "*Cordell* Cases"), *Hogan v. Cherokee Cnty.*, No. 1:18-CV-096 (W.D.N.C. 2021) (the "*Hogan* Case"), and *Simonds v. Cherokee Cnty.*, No. 1:20-CV-250 (W.D.N.C. 2023) (the "*Simonds* Case").[18]

11. Christian was involved with drafting documents and providing litigation support for each of these cases.[19] The *Hogan* Case resulted in a $4.6 million jury verdict in favor of the plaintiffs on 13 May 2021.[20] Following the jury's verdict in the

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[16] (Co-Counsel Agreement Art. 1(c).)

[17] (*See* Compl. ¶¶ 27–35.)

[18] (*See* Compl. ¶¶ 28, 35.) A number of other cases pending in the United States District Court for the Western District of North Carolina were consolidated for settlement purposes under the title of *Simonds v. Cherokee Cnty*. (*See* Compl. ¶ 46.) The Court's references to the "*Simonds* Case" include these additional consolidated cases.

[19] (*See* Compl. ¶ 47; *see also* Answer Compl., Affirmative Defenses, Countercl. Damages, and Countercl. Declaratory J. ¶¶ 20–23, ECF No. 11.) Defendant's Answer is numbered separately from his Counterclaims; the Court will hereinafter cite to the former as "Answer" and the latter as "Countercls."

[20] (*See* Compl. ¶¶ 32, 75.)

Hogan Case, the *Cordell* Cases and others were settled for substantial sums, and settlement negotiations began in the *Simonds* Case.[21]

12. In July 2021, Christian filed a motion to recover attorneys' fees and prejudgment interest for the work Plaintiffs and Defendant performed in the *Hogan* Case.[22] The federal district court issued a Memorandum of Decision and Order (the "Fee Order") resolving the motion for attorneys' fees on 22 February 2022.[23] In the Fee Order, the federal district court reduced the fees sought by 40% due to numerous instances of block, duplicative, vague, and excessive billing in the *Hogan* Case.[24]

13. Prior to the trial in the *Hogan* Case, Christian began to suffer from personal, health, and financial troubles.[25] His health problems worsened after the trial and the subsequent settlements in the *Cordell* Cases.[26] In addition, Christian entered a Chapter 13 bankruptcy proceeding in 2022.[27] Plaintiffs allege that by early 2022, due to Christian's substance abuse, scandalous personal behavior, and poor individual choices, Christian had breached the Co-Counsel Agreement by intentionally failing to (i) "provide[ ] any meaningful financial contribution toward any of the cost and expenses for any of the cases after Hogan[,]" (ii) "provide the services needed to and

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[21] (*See* Compl. ¶¶ 38–40, 42–43, 76; Countercls. ¶¶ 50–51, 55.)

[22] (Countercls. ¶ 65.)

[23] (Mem. Decision and Order [hereinafter "Fee Order"], ECF No. 23.1.)

[24] (*See* Fee Order 6–17, 28; *see also* Countercls. ¶¶ 67–75.)

[25] (*See* Countercls. ¶¶ 101–03.)

[26] (*See* Compl. ¶ 49; Countercls. ¶ 104.)

[27] (Compl. ¶ 67.)

agreed upon in the [Agreement] to properly complete the work required for the remaining cases[,]" and (iii) "participate meaningfully in the relevant aspects of the case and cases [sic], including [by failing] to provide insight, advice, action, research, and the like."[28]

14. Christian alleges that Wijewickrama and Moore confronted him about his health issues on 18 October 2022 and advised him that he would not receive any compensation from the *Simonds* Case due to his failure to meaningfully participate in the case.[29] Following this conversation, Christian sought inpatient health treatment and consented to withdraw from the *Simonds* Case.[30] The federal district court entered an order permitting Christian's withdrawal from the *Simonds* Case on 20 October 2022.[31]

15. After Christian's withdrawal, the parties to the *Simonds* Case entered into a global settlement agreement under which the defendants agreed to pay $42 million in addition to the $4.6 million then owing on the judgment entered in the *Hogan* Case.[32] To effect the settlement, Plaintiffs agreed to defer payment of their attorneys' fees and costs until after the defendants paid the plaintiffs the amounts due them

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[28] (Compl. ¶¶ 48–53.)

[29] (Countercls. ¶¶ 113, 127; *see* Compl. ¶¶ 59–61, 63–64.)

[30] (*See* Countercls. ¶ 115–17, 119; Compl. ¶ 73.)

[31] (Compl. ¶¶ 62, 74.)

[32] (Compl. ¶ 76.)

under the terms of the settlement agreement.[33] The federal court approved the settlement agreement by order dated 3 February 2023.[34]

16. After the settlement was approved, Christian demanded that Plaintiffs pay him his 1/4 equal share of the *Simonds* Case fee.[35] His demand was later memorialized in a 15 March 2023 letter by his counsel (the "Demand Letter"), which requested that the disputed sums be held in trust.[36] Plaintiffs rejected Christian's demand, contending that by failing to participate meaningfully in, and then withdrawing from, the *Simonds* Case, Christian had opted out of the Co-Counsel Agreement and thereby reduced his compensation to $300 per hour for the less than 50 hours of work he performed.[37] Christian maintains that he did not exercise the opt-out provision but could not participate in the case because of his intensive inpatient treatment.[38]

17. After receiving the Demand Letter, Plaintiffs filed the Complaint initiating this action on 17 March 2023, asserting claims for (i) declaratory judgment, (ii) breach of contract, (iii) specific performance, and (iv) breach of fiduciary duty.[39]

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[33] (Compl. ¶¶ 78, 80–83, 87; *see* Countercls. ¶ 122.)

[34] (Compl. ¶ 85; Countercls. ¶ 124.)

[35] (*See* Countercls. ¶¶ 126, 134.)

[36] (Compl. ¶ 96; Countercls. ¶ 129.)

[37] (*See* Compl. ¶¶ 60–64.)

[38] (Countercls. ¶¶ 118–20, 133.)

[39] (Compl. ¶¶ 104–33.)

18. Defendant filed his Motion to Strike, Motion to Dismiss, Answer to Complaint, Affirmative Defenses, Counterclaim for Damages and Counterclaim for Declaratory Judgment (the "Omnibus Response") on 14 April 2023.[40] After the case was designated as a complex business case pursuant to Rules 2.1 and 2.2 of the General Rules of Practice of the Superior and District Courts,[41] Defendant filed his Answer to Complaint, Affirmative Defenses, Counterclaim for Damages and Counterclaim for Declaratory Judgment (the "Answer and Counterclaims") on 20 April 2023, asserting counterclaims for (i) breach of contract and unjust enrichment against all Plaintiffs, (ii) breach of fiduciary duty against Wijewickrama, and (iii) declaratory judgment.[42] At the same time, he moved to dismiss three of Plaintiffs' claims[43] and moved to strike portions of the Complaint.[44]

19. Plaintiffs later moved to dismiss two of Defendant's counterclaims.[45]

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[40] (Def.'s Mot. Strike, Mot. Dismiss, Answer Compl., Affirmative Defenses, Countercl. Damages and Countercl. Declaratory J. [hereinafter "Omnibus Resp."], ECF Nos. 5, 13.) Defendant inadvertently filed his Omnibus Response twice on the Court's electronic docket.

[41] (*See* Designation Order, ECF No. 1.)

[42] (Countercls. ¶¶ 135–54, 7–9.) In his Answer and Counterclaims, Defendant lists his first three counterclaims under the heading "Counterclaim for Damages," followed by paragraphs numbered 1–154, and includes his fourth counterclaim under the separate heading "Counterclaim for Declaratory Judgment," followed by paragraphs numbered 1–9.

[43] (Def.'s Mot. Dismiss 1.)

[44] (Def.'s Mot. Strike 1.)

[45] (Pls.' Mot. Dismiss Countercls. 1 [hereinafter "Pls.' Mot. Dismiss"].)

20. The Court convened a hearing on the Motions via Webex videoconference on 28 June 2023, at which all parties were represented by counsel (the "Hearing"). The Motions are now ripe for resolution.

II.

LEGAL STANDARD

21. When ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must consider "whether the allegations of the [challenged pleading], if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)).

22. Dismissal pursuant to Rule 12(b)(6) is proper when "(1) the [challenged pleading] on its face reveals that no law supports [its] claim[s]; (2) the [pleading] on its face reveals the absence of facts sufficient to make a good claim; or (3) the [pleading] discloses some fact that necessarily defeats the [non-moving party's] claim." *Id.* (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)).

23. On a Rule 12(b)(6) motion, the challenged pleading is construed liberally, viewing the allegations as true and in the light most favorable to the non-moving party, and the claim is not dismissed unless it appears beyond doubt that the non-moving party could prove no set of facts in support of his claim which would entitle him to relief. *U.S. Bank Nat'l Ass'n ex rel. C-BASS Mortg. Loan Asset-Backed Certificates, Series 2006-RP2 v. Pinkney*, 369 N.C. 723, 726 (2017). While "the well-

pleaded material allegations of the [challenged pleading] are taken as true[,] conclusions of law or unwarranted deductions of fact are not admitted." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599 (2018) (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448 (2015)).

24. Under Rule 12(f), a court may "strike 'from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.' " *Carpenter v. Carpenter*, 189 N.C. App. 755, 765 (2008) (quoting Rule 12(f)). "Rule 12(f) motions are 'addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion.' " *Reese v. City of Charlotte*, 196 N.C. App. 557, 567 (2009) (quoting *id.*).

25. At the same time, "Rule 12(f) motions are viewed with disfavor and are infrequently granted." *Merrell v. Smith*, 2020 NCBC LEXIS 126, at *5 (N.C. Super. Ct. Oct. 22, 2020) (quoting *Daily v. Mann Media, Inc.*, 95 N.C. App. 746, 748–49 (1989)). "Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Carpenter*, 189 N.C. App. at 766 (alteration in original) (quoting *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316 (1978)).

III.

ANALYSIS

26. The Court begins its analysis with the Motions to Dismiss because issues presented in these motions bear on the Court's resolution of the Motion to Strike. The Court first addresses Defendant's Motion to Dismiss.

A. Defendant's Motion to Dismiss

27. Defendant's Motion to Dismiss seeks to dismiss Plaintiffs' claims for breach of contract, specific performance, and breach of fiduciary duty.[46] The Court will take up each in turn.

1. Breach of Contract

28. Defendant argues that Plaintiffs have failed to sufficiently state a claim for breach of contract, arguing that Plaintiffs have failed to (i) identify with specificity the provisions of the Co-Counsel Agreement that Defendant is alleged to have breached, (ii) plead facts showing that a breach has occurred, (iii) identify with specificity when the alleged breach(es) occurred; and (iv) plead legally cognizable damages resulting from any alleged breach(es).[47]

29. "Unlike claims subject to Rule 9, a claim for breach of contract is not subject to heightened pleading standards[.]" *AYM Techs., LLC. v. Rodgers*, 2018 NCBC LEXIS 14, at *52–53 (N.C. Super. Ct. Feb. 9, 2018). "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). "Thus, in any breach of contract action, the complaint must allege the existence of a contract between the plaintiff and the defendant, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to the plaintiff from such breach." *Howe v. Links Club Condo. Ass'n*, 263 N.C. App. 130, 139 (2018) (cleaned up).

[46] (Def.'s Mot. Dismiss 1.)

[47] (*See* Br. Supp. Def.'s Mot. Dismiss 3–6, ECF No. 8.)

30. Although Plaintiffs' breach of contract claim contains minimal details and the allegations of the Complaint lack specificity, Rule 8(a)(1) requires only that the Complaint contain a "short and plain statement of the claim" being asserted. Under this liberal standard, the Court concludes that Plaintiffs have adequately alleged claims for breach of contract by non-performance and by repudiation.

31. The Complaint alleges that the Co-Counsel Agreement was a valid and enforceable contract executed by Plaintiffs and Defendant on 20 December 2017.[48] According to Plaintiffs, the Co-Counsel Agreement "establish[ed] responsibilities, work and collateral duties and memorialize[d] their agreement regarding this venture[.]"[49] Under the Agreement, Defendant was required to "assist in research, motion preparation and [provide] any assistance as needed[.]"[50] Defendant, like Plaintiffs, was also required to "participate equally in strategy, preparation and review of documents, attend[ing] Court for hearings and trial[,] and any settlement discussions."[51]

32. Plaintiffs allege that, "[a]fter the culmination of the Hogan verdict, and receipt of the Cordell funds," Defendant breached these provisions by "fail[ing] to provide the services needed . . . and agreed upon . . . to properly complete the work

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[48] (Compl. ¶¶ 20, 25–26.)

[49] (Compl. ¶ 24.)

[50] (Co-Counsel Agreement Art. 1(a)(vi).)

[51] (Co-Counsel Agreement Art. 1(a).)

required for the remaining cases."[52] Plaintiffs further allege that, when requested to assist, Defendant not only "failed to perform his tasks[,]" but also "provided dishonest answers as to status and work performed."[53] Plaintiffs also aver that, up until Defendant opted out of the Co-Counsel Agreement and withdrew from the *Simonds* Case in October 2022, Defendant "failed to participate[ ] in any meaningful way and . . . billed less than 50 hours[.]"[54]

33. Plaintiffs argue that Defendant's "intentional failures caused [them] avoidable burdens, undue hardship, and unnecessary stress"[55] and that Defendant's alleged breach "has caused [them] harm, injury, and damage[.]"[56]

34. The Court concludes that these alleged facts sufficiently comply with Plaintiffs' pleading burden under Rule 8 and allow Plaintiffs' claim for breach of contract by non-performance to survive under Rule 12(b)(6).

35. Plaintiffs also allege sufficient facts to support a claim for breach of contract by repudiation. Repudiation occurs when one party makes a positive statement to "the other party indicating that he will not or cannot substantially perform his

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[52] (Compl. ¶ 49; *see also* Compl. ¶¶ 32 (jury verdict in the *Hogan* Case issued on 13 May 2021), 40, 43 (Defendant received final payment from the *Cordell* Cases on 6 January 2022).)

[53] (Compl. ¶ 56; *see also* Compl. ¶ 55 (alleging Defendant breached the Agreement "through his unwillingness and inability to communicate with [P]laintiffs at critical times with crucial deadlines with regard to critical issues").)

[54] (Compl. ¶¶ 60–62; *see also* Compl. ¶ 53 (alleging Defendant "fail[ed] to provide insight, advice, action, research, and the like[ ]").)

[55] (Compl. ¶ 50.)

[56] (Compl. ¶ 117.)

contractual duties." *Profile Invs. No. 25, LLC v. Ammons E. Corp.*, 207 N.C. App. 232, 236 (2010) (quoting *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 510 (1987)). "[T]o result in a breach of contract, 'the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute[.]' " *Id.* at 237 (quoting *Edwards v. Proctor*, 173 N.C. 41, 44 (1917)). Nevertheless, such "refusal to perform is not a breach unless it is treated as such by the adverse party." *Id.* (cleaned up).

36. Under the Agreement, if attorneys' fees are recovered, Plaintiffs and Defendant are paid "based on percentage of time in the case[,]" and, presumptively, "shall divide fees equally[.]"[57] The Agreement further provided that, although "each lawyer shall be treated equally[,]" once an attorney chooses to "opt out," that "lawyer shall be entitled to a billable hour of work done at the rate of $300 per hour."[58]

37. Plaintiffs allege that, when Defendant chose to opt out of the Agreement and withdraw from the *Simonds* Case in October 2022, he acknowledged that his actions "would result in only an hourly fee being . . . payable to him."[59] According to the Complaint, Defendant was paid in full for the portion of the fees awarded to him in the *Hogan* Case based on his hourly fee application.[60] Plaintiffs additionally allege that, prior to withdrawing from the *Simonds* Case, Defendant was informed that, as

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[57] (Co-Counsel Agreement Art. 2(c)–(d).)

[58] (Co-Counsel Agreement Art. 1(c).)

[59] (Compl. ¶ 72.)

[60] (*See* Compl. ¶ 90.)

part of the settlement agreement, Plaintiffs had agreed to delay recovery of any attorneys' fees until after the plaintiffs in the *Simonds* Case received their shares.[61] Plaintiffs allege that Defendant failed to object to the deferral of compensation.[62]

38. Plaintiffs further allege that on 15 March 2023, Defendant "compounded [his] breach of the [A]greement . . . by writing a demand letter providing by its terms that it was intended to place the [P]laintiffs on notice of a fee dispute, and refusing to abide by the terms of the [A]greement with respect to payment upon an attorney opting out" and "demanding payment despite the [o]rder . . . approving the [*Simonds* Case] settlement and the terms of payment deferring attorney's fees[.]"[63] The Complaint alleges that complying with the demands in Defendant's Demand Letter would cause Plaintiffs to violate both the Co-Counsel Agreement and the order approving the *Simonds* Case settlement.[64] In response, Plaintiffs initiated this action two days later.

39. The Court finds that these allegations are sufficient to state a claim for breach of contract by repudiation. As a result, Defendant's Motion to Dismiss Plaintiffs' breach of contract claim must also be denied for this separate reason.

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[61] (*See* Compl. ¶¶ 65, 87, 89.)

[62] (*See* Compl. ¶ 66.)

[63] (Compl. ¶ 96.)

[64] (*See* Compl. ¶¶ 96–99.)

2. Specific Performance

40. Defendant next seeks the dismissal of Plaintiffs' claim for specific performance, arguing that the Complaint fails to (i) attach a copy of the Co-Counsel Agreement, (ii) "adequately describe the term of the contract that was breached and the actions or performance that was not performed[,]" and (iii) "identify what actions, if any, [Plaintiffs] expect Defendant to take, sums to be paid, or the appropriate provision of the contract that mandates the associated performance or payments."[65] Plaintiffs contend that this claim is pleaded as an alternative remedy to their claim for breach of contract by repudiation and seek to "require the Defendant to accept the fee deferment" Plaintiffs agreed to as part of the *Simonds* Case settlement and "accept the fee basis set by the opt out provisions of the Co-Counsel Agreement."[66]

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[65] (Br. Supp. Def.'s Mot. Dismiss 7.)

[66] (*See* Pls.' Br. Opp'n Def.'s Mot. Dismiss 14.) At the Hearing, Plaintiffs' counsel argued that this claim is more closely tied to the declaratory judgment claim. To be sure, Plaintiffs ask the Court to "declare[ ] the legal rights and responsibilities of the parties, including . . . the meaning and effect of the parties[']] [A]greement, that the [P]laintiffs are in compliance with the [A]greement, and the [D]efendant is in breach of the [A]greement," specifically as it relates to the payment to Defendant for his work on the *Hogan* Case and the deferred compensation under the *Simonds* Case settlement. (Compl. ¶¶ 107–11.) However, Plaintiffs' counsel also argued that Defendant's alleged repudiation of the Agreement in the Demand Letter served as the material breach underlying the specific performance claim. Because the Court has concluded that Plaintiffs' Complaint adequately states a claim for breach of contract by repudiation as well as by non-performance, Plaintiffs properly pleaded their specific performance claim as an alternative to their breach of contract claim even though the allegations associated with the breach overlap with their request for declaratory judgment. *See James River Equip., Inc. v. Mecklenburg Utils., Inc.*, 179 N.C. App. 414, 419 (2006) ("It is well-established that liberal pleading rules permit pleading in the alternative, and that theories may be pursued in the complaint even if plaintiff may not ultimately be able to prevail on both." (cleaned up)).

41. Under North Carolina law, the party seeking specific performance "[must] prove that (i) the remedy at law is inadequate, (ii) the obligor can perform, and (iii) the obligee has performed [his] obligations." *Reeder v. Carter*, 226 N.C. App. 270, 275 (2013) (cleaned up). Where it is available, specific performance may "compel a party to do precisely what he ought to have done without being coerced by the court." *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694 (1981) (citation omitted). Importantly, specific performance may be available to prohibit a party's further breach of contract. *See, e.g.*, *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 405 (1983); *U-Haul Co. of N.C., Inc. v. Jones*, 269 N.C. 284, 287 (1967).

42. Plaintiffs contend that paragraph 20 of the Complaint reproduces the Co-Counsel Agreement verbatim.[67] As discussed above, Plaintiffs have pleaded a claim for breach of contract by repudiation and allege that "[D]efendant's breach of the [Agreement] has and will have continuing effect."[68] Plaintiffs further allege that Defendant has been paid at an hourly rate for his work on the *Hogan* Case[69] and that payment of attorneys' fees associated with the *Simonds* Case has been deferred as part of the settlement agreement.[70] In their prayer for relief, Plaintiffs ask the Court to "[o]rder specific performance of the parties' [A]greement[.]"[71]

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[67] (Pls.' Br. Opp'n Def.'s Mot. Dismiss 6, 14.)

[68] (Compl. ¶ 122.)

[69] (*See* Compl. ¶ 90.)

[70] (*See* Compl. ¶¶ 65, 87, 89.)

[71] (Compl. Prayer for Relief ¶ 4.)

43. Taking these allegations as true and viewing them in the light most favorable to Plaintiffs, the Court concludes that Plaintiffs have pleaded an alternative claim for specific performance and will therefore deny Defendant's Motion to Dismiss as to this claim. *See Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 423–24 (1980) (finding that pleading the existence of a contract and a request to "requir[e] [a party] to specifically perform all of the terms and provisions of the contract" sufficient to state a claim for specific performance), *modified on other grounds*, 301 N.C. 689 (1981).

3. Breach of Fiduciary Duty

44. To successfully plead 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).

45. Defendant first argues that Plaintiffs have failed to allege facts that establish the existence of a fiduciary relationship among the parties.[72] However, Plaintiffs allege that the Co-Counsel Agreement is "a joint venture agreement or partnership agreement,"[73] a fact which Defendant admits in his Answer and Counterclaims.[74] "While the sufficiency of the complaint is to be determined upon

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[72] (*See* Br. Supp. Def.'s Mot. Dismiss 8.)

[73] (Compl. ¶ 22.)

[74] (*See* Answer ¶ 22 ("Admitted that the Co-Counsel Agreement is both a joint venture agreement and partnership agreement.").)

the face of the complaint," *RGK, Inc.*, 292 N.C. at 677, "the allegations contained in all pleadings ordinarily are conclusive as against the pleader[,]" *Davis v. Rigsby*, 261 N.C. 684, 686 (1964). "An admission in a pleading which admits a material fact becomes a judicial admission in the case." *Water Damage Experts of Hillsborough, LLC v. Miller*, No. COA22-270, 2023 N.C. App. LEXIS 38, at *5 (N.C. Ct. App. Feb. 7, 2023) (unpublished) (quoting *Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 158 (1995)).

46. Defendant is therefore deemed to have admitted that the Co-Counsel Agreement created both a joint venture agreement and a partnership agreement,[75] and, as business partners, Defendant and Plaintiffs were "each other's fiduciaries as a matter of law." *Marketplace Antique Mall, Inc. v. Lewis*, 163 N.C. App. 596, 600 (2004) (holding that a partnership creates a fiduciary relationship among partners); *see Sykes*, 372 N.C. at 340–41 (affirming dismissal of a breach of fiduciary duty claim when allegations were insufficient to establish the existence of a joint venture).

47. Defendant also contends that Plaintiffs fail to allege how Defendant breached his fiduciary duty aside from demanding a portion of the legal fees in his Demand Letter.[76] Plaintiffs additionally allege, however, that Defendant breached his fiduciary duty by "breach[ing] the [A]greement and his failure to meaningfully

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[75] The Court additionally concludes that, even if Defendant had not admitted that the Agreement created both a joint venture and a partnership, the allegations contained in the Complaint are sufficient to establish that the Agreement created a joint venture between Plaintiffs and Defendant.

[76] (Br. Supp. Def.'s Mot. Dismiss 8–9.)

participate in pursuing the cases to conclusion[,]" "consum[ing] impairing substances and engaging in [scandalous] conduct[,]" and "his lack of participation" during the course of the *Simonds* Case.[77]

48. But this is the same conduct alleged as the basis for Plaintiffs' breach of contract claim. The injury Plaintiffs have allegedly suffered, and the damages they seek to recover on their breach of fiduciary duty claim, do not arise from the parties' fiduciary relationship and instead are created by and available only under the Agreement. "North Carolina courts have consistently applied the economic loss rule to hold that purely economic losses are not recoverable under tort law[.]" *Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc.*, 376 N.C. 54, 63 (2020). "While it is certainly true that a contracting party may have fiduciary duties to his counterparty that are separate and distinct from his contractual duties and thus may be enforceable in tort," *Perry v. Frigi-Temp Frigeration, Inc.*, 2020 NCBC LEXIS 100, at *17 (N.C. Super. Ct. Sept. 3, 2020), Plaintiffs here fail to allege the existence and breach of any duties or damages separate and apart from those created by the Co-Counsel Agreement. Accordingly, the economic loss rule bars Plaintiffs' breach of fiduciary duty claim. *See id.* at *18–19; *see also, e.g.*, *Wilkins v. Wachovia Corp.*, No. 5:10-CV-249, 2011 U.S. Dist. LEXIS 30896, at *6 (E.D.N.C. Mar. 24, 2011) (applying economic loss rule to bar breach of fiduciary duty claims which arose "out of the duties in the . . . agreement and relate to contract performance"); *Haigh v. Superior Ins. Mgmt. Grp., Inc.*, 2017 NCBC LEXIS 100, at *19 (N.C. Super. Ct. Oct. 24, 2017)

[77] (Compl. ¶¶ 57–59; *see also* Pls.' Br. Opp'n Def.'s Mot. Dismiss 11–12.)

(dismissing breach of fiduciary duty claim where alleged wrongdoing was "a result of the parties' *contractual* relationship, not as a result of a *fiduciary* relationship" and would be "better resolved through contract principles, rather than general principles of fiduciary relationships"). The Court will therefore grant Defendant's Motion to Dismiss this claim.[78]

B. Plaintiffs' Motion to Dismiss

49. Plaintiffs' Motion to Dismiss seeks to dismiss (i) Defendant's counterclaim for breach of contract against Plaintiffs to the extent this claim seeks recovery for loss of prospective attorneys' fees in the *Hogan* Case, and (ii) Defendant's counterclaim for breach of fiduciary duty against Wijewickrama in its entirety or, alternatively, to the extent this claim seeks recovery for loss of prospective attorneys' fees in the *Hogan* Case.[79]

50. Defendant's counterclaim for breach of contract is straightforward. He alleges that he never exercised the opt-out provision of the Co-Counsel Agreement

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[78] Defendant raises an additional argument that Plaintiffs' breach of fiduciary duty claim should be dismissed because the Complaint fails to comply with Rule 9(b) and "does not state with particularity the required element of fraud." (Br. Supp. Def.'s Mot. Dismiss 7.) However, the Complaint alleges that Defendant's breach of his fiduciary duty constituted *constructive* fraud. (*See* Compl. ¶¶ 130, 132 (emphasis added).) "A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud." *Hunter v. Guardian Life Inc. Co. of Am.*, 162 N.C. App. 477, 482 (2004) (citation omitted). Instead, to plead a claim of constructive fraud, "a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty." *Id.* (citation omitted). The Court therefore finds this argument without merit.

[79] (Pls.' Mot. Dismiss 1.) The Court notes that Defendant expends much effort and space in his opposition brief defending his third cause of action for unjust enrichment. (*See* Def.'s Br. Opp'n Pls.' Mot. Dismiss 7–10, ECF No. 30.) However, since Plaintiffs' Motion to Dismiss does not seek dismissal of this claim, the Court need not address these arguments.

and that Plaintiffs breached the Agreement by not paying him the compensation to which he was allegedly entitled for his work on the *Hogan* Case and *Simonds* Case.[80]

51. Defendant's breach of fiduciary duty counterclaim alleges that Plaintiffs engaged in vague, duplicative, and excessive billing practices—behavior in which Defendant claims he did not participate—that resulted in a blanket 40% reduction of all four attorneys' billed hours in the *Hogan* Case.[81] Specifically, Defendant alleges that Wijewickrama breached his fiduciary duty to him "by failing to properly account for the hours and expenses of the attorneys in the Co-Counsel Agreement, resulting in a reduced award and personal loss to [Defendant] in a minimum amount of $116,147.50."[82]

52. Plaintiffs argue that, despite the existence of a fiduciary relationship between Defendant and Wijewickrama, co-counsel have neither a "fiduciary duty to protect one another's prospective interests in a fee[,]" nor a "cause of action against [one another] for prospective fees lost."[83]

53. This issue appears to be a matter of first impression in North Carolina. Other courts, however, have adopted Plaintiffs' position, citing potential conflicts of interest between duties owed to co-counsel and those owed to clients or out of a concern that the attorney-client privilege could be jeopardized in cases where, as here,

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[80] (Countercls. ¶¶ 74–75, 77–79, 85, 132–34, 138.)

[81] (Countercls. ¶¶ 67–77.)

[82] (Countercls. ¶ 86.)

[83] (Pls.' Br. Supp. Mot. Dismiss Countercls. 5–6 [hereinafter "Br. Supp. Pls.' Mot. Dismiss"], ECF No. 23.)

a conflict arises between co-counsel. *See, e.g.*, *Beck v. Wecht*, 28 Cal. 4th 289, 298 (Cal. 2002); *Scheffler v. Adams & Reese, LLP*, 950 So. 2d 641, 652–53 (La. 2007); *Blondell v. Littlepage*, 185 Md. App. 123, 146–47 (Md. Ct. Spec. App. 2009); *Mazon v. Krafchick*, 144 P.3d 1168, 1171–73 (Wash. 2006); *Horn v. Wooster*, 165 P.3d 69, 78–79 (Wyo. 2007); *see also Skepneck v. Roper & Twardowsky*, LLC, No. 11-CV-4102-DDC-JPO, 2015 U.S. Dist. LEXIS 95966, at *63–64 (D. Kan. July 23, 2015) ("Even assuming that the parties had formed a joint venture, New Jersey law prohibits a breach of fiduciary duty claim between co-counsel to recover fees.").

54. The Court finds the public policy concerns raised by these courts compelling and, in the absence of any counterarguments by Defendant, concludes that the Supreme Court of North Carolina would adopt a similar prohibition on finding the existence of a fiduciary duty among co-counsel to protect one another's interest in a prospective fee or permitting an attorney to bring a cause of action against co-counsel for the loss of a prospective fee.

55. Accordingly, the Court will dismiss Defendant's breach of contract counterclaim to the extent it seeks to recover damages for loss of prospective attorneys' fees in the *Hogan* Case and, since this is the only subject matter it covers, the breach of fiduciary duty counterclaim will be dismissed in its entirety.

56. The Court further concludes that Defendant's breach of fiduciary duty counterclaim also must be dismissed because Defendant's allegations that Plaintiffs' behavior alone resulted in a reduction of attorneys' fees in the *Hogan* Case is inaccurate and contradicted by the language of the Fee Order itself, which states that

"the hours claimed by the . . . *four* attorneys contain a significant number of hours that are excessive or duplicative."[84]

57. "A document that is the subject of a [party]'s action that he or she specifically refers to in the [pleading] may be attached as an exhibit by the [opposing party] and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment." *Holton v. Holton*, 258 N.C. App. 408, 419 (2018). Moreover, "the trial court can reject allegations that are contradicted by the documents . . . specifically referred to . . . in the [pleading]." *Wilson v. SunTrust Bank*, 257 N.C. App. 237, 244 (2017) (citation omitted). Because the Fee Order contradicts Defendant's assertion that it was Wijewickrama alone who "fail[ed] to properly account for the hours and expenses of the attorneys[,]"[85] the Court concludes that Defendant's breach of fiduciary duty counterclaim must also be dismissed on this additional ground.[86]

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[84] (*Compare* Countercls. ¶¶ 67–76, *and* Def.'s Br. Opp'n Pls.' Mot. Dismiss 6, *with* Fee Order 17 (emphasis added).)

[85] (Countercls. ¶ 86.)

[86] Plaintiffs argue that the doctrines of res judicata and collateral estoppel prevent the Defendant from denying the conclusions of the federal court in the Fee Order. (Br. Supp. Pls.' Mot. Dismiss 9.) But the Court need not examine the Fee Order's preclusive effect at this time since Defendant has not challenged the Fee Order's validity or applicability to this case.

C. Defendant's Motion to Strike

58. Defendant's Motion to Strike seeks to strike those paragraphs of the Complaint that discuss the Demand Letter, Defendant's bankruptcy proceeding, and his personal behavior.[87] The Court will address each of these challenges in turn.

59. Defendant first seeks to strike those paragraphs of the Complaint that discuss the 15 March 2023 Demand Letter, arguing that these allegations are "impertinent, irrelevant, and scandalous and include[ ] a misrepresentation of the requests and demands communicated to the Plaintiffs."[88] Defendant additionally contends that Plaintiffs' allegations related to the Demand Letter are "an improper attempt to admit settlement communications[.]"[89]

60. Plaintiffs disagree, arguing that the allegations in the Complaint "demonstrate that the [D]emand [L]etter bears on the litigation issues and is relevant[,]"[90] noting that (i) through their declaratory judgment claim, Plaintiffs seek a declaration that they may disburse client funds and attorneys' fees pursuant to the *Simonds* Case settlement terms,[91] and (ii) Defendant includes allegations related to the Demand Letter in his Answer and Counterclaims.[92] Plaintiffs additionally

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[87] (Def.'s Mot. Strike 1–4.)

[88] (Def.'s Mot. Strike 3; *see also* Br. Supp. Def.'s Mot. Strike 5–6, ECF No. 7.)

[89] (Br. Supp. Def.'s Mot. Strike 5.)

[90] (Pls.' Br. Opp'n Def.'s Mot. Strike 7, ECF No. 21.)

[91] (Pls.' Br. Opp'n Def.'s Mot. Strike 9; *see* Compl. ¶¶ 107–09.)

[92] (Pls.' Br. Opp'n Def.'s Mot. Strike 10; *see* Countercls. ¶¶ 129–30.)

contend that "neither the [Demand L]etter nor the Defendant's hearsay declarations concerning the [content of the] letter may be considered" by the Court as the Demand Letter is not part of the pleadings.[93]

61. Although the Court agrees with Plaintiffs that the Demand Letter itself is not properly before the Court,[94] *see Daily*, 95 N.C. App. at 748 ("[M]atters outside the pleadings will not be considered [on Rule 12(f) motions.]"), the Complaint alleges that the Demand Letter requires Plaintiffs to hold funds received from the *Simonds* Case settlement in a trust account as part of a fee dispute in contravention of the federal court order directing that the funds be disbursed to clients.[95] Through their first cause of action, Plaintiffs seek a declaration that these funds should be distributed according to the federal court's order.[96] At this stage in the litigation, the Court cannot conclude that the Demand Letter "has no possible bearing upon the litigation[,]" *Carpenter*, 189 N.C. App. at 766 (citation omitted), and will therefore deny the Motion to Strike those allegations related to the Demand Letter.

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[93] (Pls.' Br. Opp'n Def.'s Mot. Strike 7.)

[94] The Complaint does not attach the Demand Letter as an exhibit. (*See* Compl.) Although Defendant did attach the Demand Letter as an exhibit to his 14 April 2023 Omnibus Response, (*see* Omnibus Resp. Ex. A), Defendant did not attach it as an exhibit to his subsequent Answer and Counterclaims filed on 20 April 2023, (*see* Countercls.). Rule 15(a) permits "[a] party [to] amend his pleading once as a matter of course at any time before a responsive pleading is served . . . " and, once amended, the "amended [pleading] has the effect of superseding the original [pleading]." *Hyder v. Dergance*, 76 N.C. App. 317, 320 (1985). Thus, Defendant's 20 April 2023 Answer and Counterclaims is now the operative pleading and does not include the Demand Letter.

[95] (*See* Compl. ¶¶ 96–99.)

[96] (*See* Compl. ¶¶ 106–09.)

62. Defendant also seeks to strike those paragraphs of the Complaint that discuss his personal bankruptcy proceeding and his personal behavior prior to his withdrawal from the *Simonds* Case. Defendant contends that these allegations are "immaterial, impertinent, irrelevant, and scandalous" and were "included solely for the purpose of embarrassing the Defendant."[97]

63. With regard to the bankruptcy proceeding, Christian additionally argues that the allegations are "immaterial" because they "provide no context to the facts of the case" and "[n]one of Plaintiffs' causes of action . . . include[s] payment upon or enforcement of a bankruptcy proceeding."[98]

64. With regard to his personal behavior, Defendant argues that the "disrespectful language" used by Plaintiffs "fails to meaningfully describe Defendant's alleged conduct related to the causes of action[,]" fails to show "how this behavior affected any alleged breach of the Co-Counsel Agreement[,]" and was included "to cause embarrassment and insult the Defendant[ ]" "in an attempt to persuade the [C]ourt to perceive a moral offense against the Defendant[.]"[99]

65. Plaintiffs, however, contend that Christian's personal behavior and circumstances prevented him from participating fully in the representation and interfered with his ability to produce quality work for the venture and comply with

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[97] (Def.'s Mot. Strike 1–2; *see also* Br. Supp. Def.'s Mot. Strike 3–4.)

[98] (Br. Supp. Def.'s Mot. Strike 3–4.)

[99] (Br. Supp. Def.'s Mot. Strike 4–5.)

his contractual obligations.[100] As a result, Plaintiffs contend that both the bankruptcy proceeding and Defendant's personal behavior are material to the issues in the case because they counter Defendant's allegations that Plaintiffs had an improper motive for ousting him from the Co-Counsel Agreement and requesting that he withdraw from the *Simonds* Case.[101]

66. Although the Court agrees with Plaintiffs regarding the relevance of the bankruptcy proceeding allegations to this litigation, the Court reaches a somewhat different conclusion with respect to the paragraphs characterizing Defendant's behavior. Not only do the adjectives used to characterize Defendant's conduct serve no legal purpose, but the Court also concludes that they are immaterial, inflammatory, and designed only to harass and embarrass Defendant. While Defendant's conduct is relevant, Plaintiffs' characterization of it is not. The Court will therefore grant Defendant's Motion to Strike the adjectives used to characterize Defendant's conduct and will direct Plaintiffs to file an amended Complaint in which any references to Defendant's personal behavior shall be described as "scandalous personal conduct" as the parties agreed at the Hearing.

IV.

CONCLUSION

67. **WHEREFORE**, the Court hereby **GRANTS in part** and **DENIES in part** the Motions as follows:

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[100] (Pls.' Br. Opp'n Def.'s Mot. Strike 4–6.)

[101] (Pls.' Br. Opp'n Def.'s Mot. Strike 10–11.)

a. Defendant's Motion to Dismiss is **GRANTED** as to Plaintiffs' claim for breach of fiduciary duty, which is hereby **DISMISSED with prejudice**;

b. Defendant's Motion to Dismiss is **DENIED** as to Plaintiffs' claims for breach of contract and specific performance. These claims shall proceed to discovery;

c. Plaintiffs' Motion to Dismiss is **GRANTED** as to Defendant's breach of fiduciary duty counterclaim, which is hereby **DISMISSED with prejudice**; and

d. Plaintiffs' Motion to Dismiss is **GRANTED** as to Defendant's breach of contract counterclaim to the extent that claim seeks recovery for loss of prospective attorneys' fees in the *Hogan* Case. The Court dismisses the counterclaim **with prejudice** to this extent, and orders that the counterclaim shall otherwise proceed to discovery.

e. Defendant's Motion to Strike is **GRANTED in part** as to paragraphs 53, 55, 57, 58, 63, 64, and 67 of the Complaint relating to Defendant's personal conduct. Plaintiffs shall have through and including 21 August 2023 to file an amended Complaint that substitutes the phrase "scandalous personal conduct" for all references to Defendant's personal behavior. The Motion to Strike is otherwise **DENIED**.

SO ORDERED, this the 11th day of August, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge