STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 5127
THEODORE STAMATAKOS, M.D., Plaintiff, v. CAROLINA UROLOGY PARTNERS, PLLC, RICHARD NATALE II, M.D., and COURTNEY CLAIR, Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS COUNTS I AND III OF PLAINTIFF'S FIRST AMENDED COMPLAINT AND PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

THIS MATTER is before the Court on Defendants' Motion to Dismiss Counts I and III of Plaintiff's First Amended Complaint ("Partial Motion to Dismiss," ECF No. 29) and Plaintiff's Motion for Leave to File Second Amended Complaint ("Motion to Amend," ECF No. 46) (collectively, the "Motions").

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

Gardner Skelton PLLC, by Jared E. Gardner and Bella Thoren, for Plaintiff.

Johnston, Allison & Hord, P.A., by David E. Stevens, Katie D. Burchette, and William D. McClelland, for Defendants.

Davis, Judge.

INTRODUCTION

1. This lawsuit concerns the termination of Plaintiff Theodore Stamatakos from his employment with Defendant Carolina Urology Partners, PLLC ("CUP"). The present Motions do not require the Court to rule on whether his termination was in breach of his contract with CUP. That issue will be decided at a later date. Instead, the Court must now determine whether Plaintiff's claims for fraud and unfair and deceptive trade practices ("UDTP") should be dismissed and whether Plaintiff should be permitted to amend his original Complaint for a second time.

FACTUAL AND PROCEDURAL BACKGROUND

2. The Court does not make findings of fact on a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and instead recites those facts contained in the complaint (and in documents attached to, referred to, or incorporated by reference in the complaint) that are relevant to the Court's determination of the motion. *See, e.g., Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *11 (N.C. Super. Ct. July 12, 2017).[1]

3. CUP is a North Carolina professional limited liability company with its principal place of business in Huntersville, North Carolina. (Second Am. Compl., ["SAC"] ¶ 2, ECF No. 46.1.) Courtney Clair is the chief executive officer of CUP, and

[1] As noted below, the Court is electing—in furtherance of judicial economy—to consider Defendants' arguments in support of their Partial Motion to Dismiss as applied to Plaintiff's proposed Second Amended Complaint ("SAC"). Accordingly, this Opinion cites to the factual allegations and claims contained in the proposed SAC rather than those set out in Plaintiff's Corrected First Amended Complaint (which is currently the operative pleading in this case).

Dr. Richard Natale, II is the chairman of its board of managers. (SAC ¶¶ 4, 59.) Until 3 November 2021, Plaintiff was a member of CUP. (SAC ¶¶ 75–76.)

4. Plaintiff is a urologist. (SAC ¶ 9.) In late 2008, prior to the creation of CUP, Plaintiff founded and operated an independent urology practice, Providence Urology, PLLC ("Providence Urology"). (SAC ¶ 9.) Providence Urology operated at 1428 Ellen Street, Suite A, in Monroe, North Carolina (the "Monroe Office"). (SAC ¶ 9.)

5. At the end of 2009, Providence Urology opened a second office in Matthews, North Carolina (the "Matthews Office"). (SAC ¶ 10.)

6. In November 2010, Plaintiff "participated in the creation of CUP, a twenty-four-physician urology group with seven divisions . . . in Charlotte, North Carolina, and surrounding areas." (SAC ¶ 15.) The formation of CUP "was in large part motivated by [a desire] for greater bargaining power in business dealings with insurance providers, suppliers, and vendors[.]" (SAC ¶ 16.) Because the divisions of "CUP made up the majority of urology practices in their respective geographic areas[,] . . . CUP . . . had greater strength to negotiate insurance pricing and set pricing for urology services" than any individual division would have possessed prior to consolidation. (SAC ¶ 18.)

7. The original divisions of CUP included urology practices "named 'Gastonia,' 'Lake Norman,' 'Northeast,' 'Piedmont,' 'South Carolina,' 'Cleveland,' and [Plaintiff's] Providence Urology, consisting of both . . . [the] Monroe Office and [ ] Matthews Office, but labeled, singly, the 'Providence Division.' " (SAC ¶ 21.)

8. Because Plaintiff was the only urologist practicing within the Providence Division, it was considered a single-member division under CUP's Operating Agreement. (SAC ¶ 57.)

9. The Operating Agreement contains provisions addressing four scenarios under which a member or division can be removed from CUP: (1) voluntary withdrawal by a member under § 10.5; (2) involuntary withdrawal of a member by CUP under § 10.6; (3) voluntary withdrawal by a division under § 10.9; and (4) involuntary withdrawal of a division by CUP under § 10.11. (Operating Agreement, Corrected First Am. Compl. ["CFAC"] Ex. A, ECF No. 46.1, at 44–53.)

10. Section 10.5 of the Operating Agreement governs the voluntary withdrawal by a member and provides in relevant part that "[a]ny Member may voluntarily withdraw from the Company upon at least 12 months' prior written notice[.]" (Operating Agreement, at 44 (emphasis removed).) Section 10.5 further states that "[t]he notice requirement . . . may be waived or shortened by the affirmative vote of a Supermajority of the Board of Managers and a two-thirds (2/3) Interest of the Members within the Affected Division (excluding the withdrawing Member)." (Operating Agreement, at 44.)

11. Section 10.6 of the Operating Agreement governs the involuntary withdrawal (essentially, a termination) of a member by CUP. Section 10.6 provides that "[i]nvoluntary [w]ithdrawal based upon termination of a Member's Member Services Agreement, and the corresponding decision to terminate a Member's Member Services Agreement for reasons other than those listed as 'Termination of a

Physician for Cause' as described in the Member's Member Services Agreement, may be initiated by either a Majority-In-Interest of the Members within a Division . . . o[r] a Supermajority of the Board."

12. Section 10.9 of the Operating Agreement governs the voluntary withdrawal by a division. Section 10.9 provides that "an entire Division may Voluntarily Withdraw from the Company" if the members of the division give "at least twelve (12) but no more than forty (40) months prior written notice of their intention to withdraw as an entire Division[.]" (Operating Agreement, at 50 (emphasis removed).) Section 10.9 further provides that "[t]he Board shall have the discretion to reduce such notice period." (Operating Agreement, at 50.)

13. Section 10.11 of the Operating Agreement governs the involuntary withdrawal of a division—another means of termination by CUP. Section 10.11 provides as follows:

> [t]he Membership Interest of all of the Members of a particular Division may be redeemed without such Member's consent upon the vote of a Supermajority of the Managers, exclusive of the Managers of the affected Division. Such Involuntary Withdrawal shall become effective ninety (90) days after the Board of Managers delivers written notice of such Involuntary Withdrawal to the principal addresses of such Division and the Member from that Division that represented the Division on the Board. As provided for above, in the event of such Involuntary Withdrawal, the involuntarily Withdrawing Division would have the right to acquire certain Division Assets and capital operating and office leases affiliated with such Division Assets and Practice Locations as provided for [elsewhere in the Operating Agreement.]

(Operating Agreement, at 53.)

14. Plaintiff refers to § 10.9 as his "Escape Hatch" because, he asserts, it provided the Providence Division with a contractual right to voluntarily withdraw

from CUP. Under this provision, a CUP division "can uncouple from CUP and carry on essentially as if it had never joined CUP to begin with." (SAC ¶ 51.) *See, e.g.*, SAC ¶ 82 ("Had Plaintiff known, or had Clair not given him assurances about the continuation of his lease, . . . Plaintiff could and would have used his Division Escape Hatch to continue his profitable practice[.]"). (*See* SAC ¶¶ 46–47, 57.)

15. After the formation of CUP, a company called Slim, LLC ("Slim") purchased the Monroe Office's building. (SAC ¶ 35.) At the time, Plaintiff was the sole owner and member of Slim. (SAC ¶ 35.) CUP then leased the Monroe Office from Slim. (SAC ¶ 35.)

16. The initial term of the lease was five years, and the lease's term "was automatically renewable for two additional five-year terms." (SAC ¶ 35.) The lease was "automatically renewed after 31 December 2016 for an additional five-year term through 31 December 2021." (SAC ¶ 36.) The terms of the lease "required 120 days' notice prior to the expiration of the current term if either party elected not to renew" it. (SAC ¶ 35.)

17. In early May 2021, Clair began to discuss a new draft lease for the Rock Hill Division of CUP with Dr. David Wright, another member of CUP. (SAC ¶¶ 5, 67.)

18. On or about 1 June 2021, Clair (on behalf of CUP) executed a new two-year lease for the Rock Hill Division. (SAC ¶ 67.)

19. "On or about 1 July 2021, Clair . . . also executed a two-year lease for the Gastonia Division[.]" (SAC ¶ 71.)

20. The 2021 leases for the Rock Hill and Gastonia Divisions were substantially similar. (SAC ¶¶ 69, 75.)

21. In late August 2021, Clair emailed Plaintiff to inform him that CUP did not intend to renew the lease for the Monroe Office for another five-year term. (SAC ¶ 60.) Clair stated that "[s]imilar notifications ha[d] been and w[ould] be sent to ALL CUP office space and operational contracts containing automatic renewal clauses." (SAC ¶ 60 (emphasis in original).) In a reply email, Plaintiff inquired whether "CUP planned to negotiate 'a new contract with different terms.' " (SAC ¶ 61.)

22. Clair responded the next day, stating that "nothing needed to be done at that time" because "CUP was letting all its existing leases expire and go month to month until CUP could prepare 'a CUP standard lease with two-year (renewable) terms' for all CUP offices by the end of 2021." (SAC ¶ 62.) Clair's email also stated that "'[w]hen the draft lease is finalized I will send [sic] to you to review.' " (SAC ¶ 62.) In addition, Clair asked for the square footage of the Monroe Office. (SAC ¶ 62.)

23. On 4 October 2021, Plaintiff replied to Clair by email, providing the square footage of the Monroe Office and apologizing for his delay in getting back to her. (SAC ¶ 63.) He also reiterated his interest in finalizing a new lease with CUP, asking that Clair "let him know when he can sign [the] new lease, or where we are in the process." (SAC ¶ 63.) After receiving no response, Plaintiff followed up by email on 6 October 2021, noting that his lease expired at the end of the year and once again expressing his desire to remain in the Monroe Office in 2022. He further stated that

unless he received an answer to his question about the renewal of his lease, he would "assume the new lease will be effective 1/1/22, and I will have an office space to accommodate the needs of my patients[.]" (Defs.' Br. Opp'n Pl's. Mot. Leave Am. Second Am. Compl. Ex. A ["October Stamatakos and Clair Email Correspondence"], at 2, ECF No. 49.1.)

24. On 11 October 2021, Clair responded with the following email:

> Dr. Stamatakos,
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> I responded to your inquiry on 8/26 that upon expiration of your lease, your lease would convert to month to month (as will all other CUP leases) while we are in the process of getting the new leases in place. I asked you for basic information that we needed regarding the new lease, square footage clarification, and it took me 40 days to get a response from you. This information was imperative to begin the process for the new lease and determining if current rent is in line with FMV assessments that we have performed. There are no assumptions to be made as we have been straight forward and pragmatic with communications regarding leases. You will be notified, as will all other divisions once we have the new draft leases prepared.
>
> Courtney

(October Stamatakos and Clair Email Correspondence, at 1.)

25. On or about 19 October 2021, at the direction of Dr. Natale, CUP Practice Manager Laura Blaker emailed a November 2021 call schedule to Plaintiff and other members of CUP. (SAC ¶¶ 5, 84.) "[Plaintiff]'s name appeared several times on the November call schedule, and Blaker stated that CUP wanted to schedule Plaintiff for more calls in November." (SAC ¶ 84.)

26. On or about 2 November 2021, Clair sent Plaintiff a Zoom meeting invitation. (SAC ¶ 87.) By separate email, she told him that she needed to meet with him and Dr. David Konstandt the following day "regarding 'open items.' " (SAC ¶ 88.)

27. Plaintiff accepted the invitation and attended the Zoom meeting the next day at 5:30 p.m. (SAC ¶ 90.) Clair, Dr. Natale, and Dr. Konstandt also attended the meeting, along with CUP's attorney. (SAC ¶ 91.) CUP's attorney informed Plaintiff during the meeting that (1) he was "not a good fit" and that CUP "ha[d] decided to terminate [him] for no cause"; (2) his malpractice insurance had been cancelled; and (3) he "would receive an official letter and Separation Agreement via email." (SAC ¶ 91.)

28. Just after the Zoom meeting concluded, Plaintiff received via email a letter signed by Dr. Natale confirming Plaintiff's termination and informing him that his malpractice insurance would "cease as of today[.]" (SAC ¶ 93.) A proposed separation agreement and release was attached to the letter. (SAC ¶ 93.) Approximately twenty minutes after the Zoom meeting, Defendants shut down all the computers at the Monroe Office and blocked Plaintiff's access to his patient files and records. (SAC ¶ 93.)

29. The following day, Defendants sent an email to all of Plaintiff's patients, stating that the Monroe Office "ha[d] been permanently closed, and [Plaintiff] [wa]s no longer affiliated with [CUP] as of November 4, 2021.' " (SAC ¶ 111.) The email also provided that "'[t]hese changes will not affect your care,' " informing the patients "that '[i]f you had a future appointment in our Monroe location, that appointment has

been cancelled.' The email then directed patients to visit CUP's website or call another CUP office." (SAC ¶ 111.)

30. In addition, "Dr. Natale instructed Teddi Fowler[, Plaintiff's nurse,] to call all of Plaintiff's patients and arrange for them to be seen in the Mint Hill office by Dr. James Mills or at another CUP Division." (SAC ¶ 120.)

31. Plaintiff chose not to sign the separation agreement and release. (SAC ¶ 96.)

32. Instead, on 22 March 2023, Plaintiff initiated the present action in Mecklenburg County Superior Court. (ECF No. 3.) In his initial Complaint ("22 March Complaint"), Plaintiff named CUP as a defendant as well as ten additional "John Doe" defendants and asserted claims for fraud/intentional misrepresentation, breach of contract, and UDTP. (ECF No. 3.)

33. The case was designated a mandatory complex business case on 22 March 2023 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

34. On 26 July 2023, Defendants moved to dismiss Plaintiff's fraud and UDTP claims contained in the 22 March Complaint.

35. Plaintiff filed a First Amended Complaint ("FAC") on 10 August 2023, asserting the same claims but replacing the "John Doe" defendants with Clair and Dr. Natale. (ECF No. 25.)

36. In light of the filing of the FAC, the Court denied Defendants' Motion to Dismiss as moot. (ECF No. 26.) That same day, Plaintiff filed a Corrected First Amended Complaint. (ECF No. 27.)

37. On 11 September 2023, Defendants filed the Partial Motion to Dismiss (ECF No. 29), one of the Motions currently before the Court.

38. The Court held a hearing on the Partial Motion to Dismiss on 6 December 2023.

39. Prior to a ruling by the Court on the Partial Motion to Dismiss, Plaintiff filed his Motion to Amend (ECF No. 46) – the second of the Motions currently before the Court – on 2 January 2024, in which he seeks leave to file the SAC in the form set out as Exhibit A to the Motion to Amend. (ECF Nos. 46, 46.1.)

40. The proposed SAC asserts the same claims against Defendants as the Corrected First Amended Complaint: (1) a UDTP claim against all Defendants; (2) a breach of contract claim against CUP;[2] and (3) a claim for fraud/intentional misrepresentation against all Defendants. (SAC ¶¶ 139–94, ECF No. 46.1.) The only difference between the proposed SAC and the Corrected First Amended Complaint is the inclusion of additional allegations contained in the proposed SAC in support of Plaintiff's fraud claim. (SAC ¶¶ 169–194.)

41. The Court held a hearing via Webex on the Motion to Amend on 1 February 2024.

42. The Motions are now ripe for decision.

LEGAL STANDARD

43. Rule 15 of the North Carolina Rules of Civil Procedure states, in pertinent part, as follows:

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[2] Neither of the present Motions before the Court implicate Plaintiff's breach of contract claim. Therefore, the analysis contained herein does not affect the validity of that claim.

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not yet been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. R. Civ. P. 15(a).

44. Our Supreme Court has held that "[t]here is no more liberal canon in the rules than that leave to amend shall be freely given when justice so requires." *Vaughan v. Mashburn*, 371 N.C. 428, 434 (2018) (cleaned up). "This liberal amendment process under Rule 15 complements the concept of notice pleading embodied in Rule 8 and reflects the legislature's intent that decisions be had on the merits and not avoided on the basis of mere technicalities." *Id.* (cleaned up).

45. Nevertheless, "the [R]ules still provide some protection for parties who may be prejudiced by liberal amendment." *Henry v. Deen*, 310 N.C. 75, 82 (1984) (citation omitted). "Reasons for justifying denial of an amendment include: (1) undue delay, (2) bad faith, (3) undue prejudice, (4) futility of amendment, and (5) repeated failure to cure defects by previous amendments." *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *17 (N.C. Super. Ct. Dec. 22, 2021) (citation omitted). Motions to amend are "addressed to the discretion of the trial court." *Vaughan*, 371 N.C. at 433 (citation omitted).

46. "It is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good

claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.'" *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)). The Court may also "reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Laster v. Francis*, 199 N.C. App. 572, 577 (2009).

ANALYSIS

I. Motion to Amend

47. As noted above, the new allegations in the proposed SAC relate solely to Plaintiff's fraud claim.

48. Defendants do not argue that the Motion to Amend should be denied on grounds of undue delay, bad faith, or undue prejudice. The Court therefore need not address those grounds.

49. Instead, the only ground upon which Defendants oppose Plaintiff's Motion to Amend is futility – arguing that the additional allegations contained in the SAC remain insufficient to state a valid fraud claim.

50. "The futility standard under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under Rule 12(b)(6), but provides the Court liberal discretion to find that an amendment lacks futility." *Simply the Best Movers, LLC v. Marrins' Moving Sys.*, 2016 NCBC LEXIS 28, at **5–6 (N.C. Super. Ct. Apr. 6, 2016). "[A] motion to amend is not futile when 'the allegations of the [amendment], treated as true, are sufficient to state a claim upon which relief may be granted under

some legal theory, whether properly labeled or not." *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at **15 (N.C. Super. Ct. Nov. 29, 2023) (quoting *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987)). On the other hand, "[a] motion for leave to amend is futile and appropriately denied when the 'proposed amendment could not withstand a motion to dismiss for failure to state a claim.' " *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2016 NCBC LEXIS 77, at *6 (N.C. Super. Ct. Oct. 7, 2016) (quoting *Smith v. McRary*, 306 N.C. 664, 671 (1982)).

51. Defendants essentially argue that Plaintiff's fraud claim should be dismissed for the following reasons: (1) the alleged misrepresentations set out in the SAC were not, in fact, false; (2) Plaintiff's allegations of fraud have not been pled with particularity as required by Rule 9(b) of the North Carolina Rules of Civil Procedure; and (3) the benefits received by Defendants as a result of the purportedly fraudulent representations were not adequately identified.

52. Plaintiff's fraud claim is based on the theory that (1) Defendants desired to terminate his membership in CUP, take over the care of his patients, and destroy his practice in the process; and (2) they accomplished this goal via a scheme consisting of deceptive acts intended to mask their true intentions and keep Plaintiff from exercising his Escape Hatch (so as to deny him the benefits provided for under the Escape Hatch). Plaintiff alleges that as a result of Defendants' fraudulent misrepresentations he was effectively lulled into a state of complacency regarding his status with CUP and that in reliance on those misrepresentations he did not exercise the Escape Hatch.

53. Plaintiff asserts that Defendants' misrepresentations can be lumped into three categories: (1) the emails from Clair (on behalf of all Defendants) between August and October of 2021 that falsely stated that once CUP had finalized a new standard two-year lease for all of its divisions, Plaintiff would receive such a lease with a beginning date of January, 2022; (2) in October 2021, Blaker sent Plaintiff a November 2021 call schedule on which Plaintiff's name appeared several times, stating "that CUP wanted to schedule Plaintiff for more [patient] calls in November[,]" when, in fact, Defendants planned to terminate Plaintiff before he could make those calls; and (3) Plaintiff was deceived into believing the 3 November 2021 Zoom meeting was about "open items," when, in reality, the sole purpose of the meeting was to terminate him. (SAC ¶¶ 60–97.)

54. The elements of a fraud claim are a "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526–27 (2007). "Reliance on the allegedly false representations must be reasonable, and that reasonableness is a question for the jury, 'unless the facts are so clear that they support only one conclusion.' " *New v. Thermo Fisher Sci., Inc.*, 2020 U.S. Dist. LEXIS 141510, at *25 (M.D.N.C. Aug. 7, 2020) (quoting *Forbis*, 361 N.C. at 527)).

55. Because of the broad range of conduct and circumstances under which it can exist, fraud defies an exhaustive definition. *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974). As our Supreme Court has observed:

> Fraud may be defined as any trick or artifice where a person, by means of false statements, concealments of material facts, or deceptive conduct which is intended to and does create in the mind of another an erroneous impression concerning the subject-matter of a transaction, whereby the latter is induced to take action, or forbears from acting with reference to a property or legal right he has, which results to his disadvantage, and which he would not have consented to had the impression in his mind not been created and in accordance with the real facts.

Mitchell v. Strickland, 207 N.C. 141, 143 (1934).

56. "Claims of fraud are held to a heightened pleading standard pursuant to Rule 9(b) of the North Carolina Rules of Civil Procedure." *Julian v. Wells Fargo Bank, N.A.*, 2012 NCBC LEXIS 32, at **19–20 (N.C. Super. Ct. May 22, 2012). Rule 9(b) provides in relevant part that "[i]n all averments of fraud, . . . the circumstances constituting fraud . . . shall be stated with particularity." N.C. R. Civ. P. 9(b).

57. "Regardless of whether it is labeled 'fraud' or 'fraudulent misrepresentation,' the elements of the claim are the same under North Carolina law." *Botanisol Holdings II, LLC v. Propheter*, 2021 NCBC LEXIS 94, at **15 (N.C. Super. Ct. Oct. 18, 2021). To plead a claim of fraud based on an affirmative misrepresentation,

> a plaintiff "must allege (1) the time, place and content of the misrepresentation, (2) the identity of the person making the representation and (3) what was obtained as a result of the fraudulent acts or representations" in order to sufficiently plead his or her claim. *Deluca v. River Bluff Holdings II*, 2015 NCBC LEXIS 12, at *21 (N.C. Super. Ct. Jan. 28, 2015) (internal quotation marks, brackets, and citation omitted). The alleged misrepresentations must also be "definite and specific," meaning that they must be "more than 'mere puffing, guesses, or assertions of opinions' but actual representations of material facts." *Id.* (quoting *Rowan County Bd. of Educ. v. U.S. Gypum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 659 (1992)).

Aldridge v. Metro. Life Ins. Co., 2019 NCBC LEXIS 116, at *76 (N.C. Super. Ct. Dec. 31, 2019).

58. This Court has explained as follows with regard to the content of the required false representation:

> [The] false representation must relate to a past or existing fact. *See Trull v. Central Carolina Bank & Trust Co.*, 117 N.C. App. 220, 225, 450 S.E.2d 542, 545 (1994); *Martinez v. Reynders*, 2013 NCBC LEXIS 31, at *7 (N.C. Super. Ct. July 10, 2013). Statements of opinion, predictions of future events, and promises of future intent generally do not give rise to an action for fraud. *See, e.g., Leftwich v. Gaines*, 134 N.C. App. 502, 508, 521 S.E.2d 717, 722-23 (1999); *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 87, 334 S.E.2d 404, 407 (1985). In drawing this distinction, the law recognizes that opinions, predictions, and promises typically signal uncertainty or contingency in a way that statements of existing fact do not. The listener is entitled to rely on the latter, but not the former. *See Pritchard v. Dailey*, 168 N.C. 330, 332, 84 S.E. 392, 393 (1915) (holding that "[o]ne who relies on" opinions or promissory representations "must take the consequences of his own imprudence").
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> This is not a hard and fast rule. A speaker may not voice an opinion that he does not honestly believe, intending to deceive the listener, and then assert immunity from an action for fraud. *See Leftwich*, 134 N.C. App. at 508, 521 S.E.2d at 723. Likewise, "a promissory misrepresentation may constitute actual fraud if the misrepresentation is made with intent to deceive and with no intent to comply with the stated promise or representation." *Braun*, 77 N.C. App. at 87, 334 S.E.2d at 407; *accord Liggett Grp., Inc. v. Sunas*, 113 N.C. App. 19, 30, 437 S.E.2d 674, 681 (1993). In each case, the "misrepresentation of the state of the promisor's mind" is itself a misrepresentation of an existing fact, subject to a claim for fraud. *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452, 279 S.E.2d 1, 6 (1981); *accord McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 338, 713 S.E.2d 495, 503 (2011). Accordingly, it is permissible to state a claim for fraud based on promissory representations, but to do so, the plaintiff must allege facts "from which a court and jury may reasonably infer that the defendant did not intend to carry out such representations when they were made." *Whitley v. O'Neal*, 5 N.C. App. 136, 139, 168 S.E.2d 6, 8 (1969).

Potts v. KEL, LLC, 2018 NCBC LEXIS 24, at *8–9 (N.C. Super. Ct. Mar. 27, 2018).

59. Thus, "the maxim caveat emptor does not apply in cases of fraud[.]" *Tillery Envtl. LLC v. A&D Holdings, Inc.*, 2018 NCBC LEXIS 13, at *53 (N.C. Super. Ct. Feb. 9, 2018) (quoting *Johnson v. Owens*, 263 N.C. 754, 758 (1965)).

60. With regard to the lease, Plaintiff's allegations of misrepresentations made by Clair in her email exchanges with him can be summarized as follows: (1) she represented that his division (and all other CUP divisions) would be notified once the standard language of the new leases had been drafted, despite her knowledge that new two-year leases had already been finalized with two of the other CUP divisions; (2) she claimed to need the measurements of Plaintiff's Monroe Office as a delay tactic even though she was already in possession of this information; and (3) she falsely assured him that a new lease would be sent to him for his review once CUP had processed the square footage information that he provided to her.

61. Admittedly, Clair's statements in these emails are susceptible to differing interpretations. At this early stage of the litigation, however, the Court must construe these statements (along with Plaintiff's allegations as a whole) in the light most favorable to him.

62. Furthermore, Plaintiff has alleged that Clair's deceptive representations to him in their email exchange regarding the lease were supplemented by CUP's acts of (1) providing him with a November call list on which his name was listed despite CUP's knowledge that he would be terminated before he could make those calls; and (2) inviting him to a Zoom meeting under false pretenses when, in reality, the sole purpose of the meeting was to terminate him.

63. Plaintiff has also satisfied Rule 9(b) by alleging specific details with regard to the misrepresentations forming the basis for his fraud claim, including by identifying the individuals who made the alleged misrepresentations; the time, place, and manner in which the misrepresentations were made; and the benefit sought to be obtained by Defendants via the fraudulent representations. (SAC ¶¶ 170–93.)

64. Finally, the Court also rejects Defendants' argument that Clair is not a proper defendant to the fraud claim because she would not have directly benefitted from the fraudulent scheme that Plaintiff has alleged on the part of CUP. "It is well settled that one is personally liable for all torts committed by him . . . notwithstanding that he may have acted as agent for another or as an officer for a corporation." *Holcomb v. Landquest Ltd. Liab. Co.*, 2017 NCBC LEXIS 36, at *21–22 (N.C. Super. Ct. Apr. 21, 2017) (cleaned up) (citing *Palomino Mills, Inc. v. Davidson Mills Corp.*, 230 N.C. 286, 292 (1949); *see also Esteel Co. v. Goodman*, 82 N.C. App. 692, 697 (1986), *disc. rev. denied*, 318 N.C. 693 (1987) (an officer of a corporation who commits a tort is individually liable for that tort, even though acting on behalf of the corporation in committing the act).

65. To be sure, Defendants have raised arguments casting doubt on the validity of the assumptions underlying Plaintiff's fraud claim. Those arguments, however, will be better suited for the summary judgment stage when the Court will have a more fully developed factual record before it and the liberal standards of Rule 12 and Rule 15 will no longer apply.

66. Accordingly, the Court finds that Plaintiff's Motion to Amend should not be denied on futility grounds. The Motion to Amend is therefore **GRANTED**.

II. Partial Motion to Dismiss

67. Because the Court is allowing the Motion to Amend, that would normally moot the pending Partial Motion to Dismiss, meaning that Defendants would have to file a *new* motion (which would, in turn, trigger a new briefing schedule) in order to seek the dismissal of any claims contained in Plaintiff's SAC. *See Houston v. Tillman*, 234 N.C. App. 691, 695 (2014); *see also Krawiec v. Manly*, 2015 NCBC LEXIS 85, at **5–6 (N.C. Super. Ct. Aug. 24, 2015) (filing of amended complaint renders moot arguments raised in motion to dismiss prior complaint).

68. However, such a result would make little sense here. The parties have fully briefed and argued the issues upon which Defendants' Partial Motion to Dismiss is based. Moreover, as noted above, the SAC contains no new allegations relevant to Plaintiff's UDTP claim, meaning that the arguments made by Defendants in the Partial Motion to Dismiss as to the UDTP claim (and by Plaintiff in his response brief) are unaffected by the Motion to Amend. Indeed, Plaintiff's counsel has stipulated—both in his briefs and during the 1 February 2024 hearing—to the Court's resolution at the present time of all issues raised in both the Motion to Amend and the Partial Motion to Dismiss.

69. Therefore, the Court, in the exercise of its discretion and its inherent authority to control its docket in furtherance of judicial economy, will proceed to address all of the arguments raised in both Motions. *See Gateway Mgmt. Servs. v.*

Carrbridge Berkshire Grp., Inc., 2018 NCBC LEXIS 45, at *8 (N.C. Super. Ct. May 9, 2018) ("Although an amended pleading would ordinarily moot a pending motion to dismiss, the Court will consider Defendants' Motions to Dismiss as to the Amended Complaint because Defendants and Plaintiff both addressed the sufficiency of the Amended Complaint in their respective briefs and at the hearing.").

A. Fraud Claim

70. For the same reasons (set out above) that Defendants' futility arguments lack merit with regard to the allegations in the SAC, Defendants' Partial Motion to Dismiss regarding Plaintiffs' fraud claim is likewise invalid. Therefore, that portion of the Partial Motion to Dismiss is **DENIED**.

B. UDTP Claim

71. "To prevail on a claim of unfair and deceptive trade practices a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460–61 (1991).

72. Defendants raise two primary arguments in support of dismissal of the UDTP claim: (1) the claim is barred by the "learned profession" exception under N.C.G.S. § 75-1.1(b); and (2) because CUP is a single market participant, the acts alleged by Plaintiff do not constitute conduct "in or affecting commerce." Because the Court concludes that dismissal of this claim is proper based on Defendants' first contention, it need not address their second one.

73. N.C.G.S. § 75-1.1(b) provides that "[f]or purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."

74. Defendants argue that the allegations forming the basis for this lawsuit are based on the provision of medical services and the resulting effect of Plaintiff's termination from CUP on his former patients. In response, Plaintiff asserts that the learned profession exception does not apply here because this action involves a business dispute rather than the provision of medical care.

75. North Carolina courts have broadly interpreted the scope of the learned profession exception. Although our Court of Appeals has applied the exception on a number of occasions beginning in the early 1980s, our Supreme Court first addressed it five years ago in *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 333 (2019). In *Sykes,* the plaintiffs were a putative class of all chiropractors who had practiced in North Carolina since 2005, and the defendant operated as an intermediary between chiropractors and insurance companies and third-party administrators for insurance companies. *Id.* at 329. The putative class alleged antitrust and UDTP claims against the defendant, among other claims. *Id.* at 328. Our Supreme Court described the business relationship between the parties as follows:

> Essentially, [Defendant] contracts with various chiropractors, who, as part of the [Defendant's] network, are able to provide chiropractic services "in-network" for the various insurance payors with whom [Defendant] has separately contracted. In exchange for in-network access, members of [Defendant's] network agree to permit [Defendant] to negotiate with the payors the prices to be charged for in-network chiropractic services. A chiropractor must maintain an average per-patient cost at a certain level or risk termination from the network.

Id. The plaintiffs in *Sykes* alleged that the defendant was "violating North Carolina's antitrust statutes by fixing the prices charged by more than one-half of the licensed chiropractors in the state and . . . using its market power . . . to restrict [the] output of services." *Id.* at 330.

76. The Supreme Court in *Sykes* upheld this Court's dismissal of the UDTP claim based on § 75-1.1(b). *Id.* at 334. The Supreme Court observed that the Court of Appeals "ha[d] long held that members of health care professions f[e]ll within the learned profession exemption to N.C.G.S. § 75-1.1, and '[t]his exception . . . ha[d] been broadly interpreted.' " *Id.* (quoting *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 126 (2006)).

77. The Supreme Court adopted the following two-part test for determining if the learned profession exception applies in a particular case: (1) whether "the person or entity performing the alleged act [is] a member of a learned profession"; and (2) whether "the conduct in question . . . [is] a rendering of professional services." *Sykes*, 372 N.C. at 334 (quoting *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589 (2014)), *appeal dismissed and disc. rev. denied*, 368 N.C. 247 (2015)).

78. Importantly, the second prong of the test under *Sykes* includes not just the *rendering* of professional services, but also "matter[s] *affecting* the professional services rendered by members of a learned profession[.]" *Sykes*, 372 N.C. at 334 (quoting *Burgess v. Busby*, 142 N.C. App. 393, 407 (citations omitted) (emphasis added), *appeal dismissed*, 353 N.C. 525, *and disc. rev. improvidently allowed*, 354 N.C. 351 (2001).

79. Based on the facts of *Sykes*, the Supreme Court concluded that both parts of the test were satisfied because the challenged conduct was "directly related to providing patient care" in that it allegedly resulted in a reduction in the provision of such care. *Sykes*, 372 N.C. at 336.

80. *Sykes* is consistent with the approach taken by the Court of Appeals in a number of prior cases. For example, in *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, *appeal dismissed and disc. rev. denied*, 307 N.C. 127 (1982), the Court of Appeals affirmed a trial court's ruling that a group of podiatrists did not have a viable UDTP claim against a hospital that denied them staff privileges based on the applicability of the exception. The Court of Appeals reached this result despite the fact "that [the] conduct involve[d] 'commercial' activity, not the rendering of 'professional services[,]' " based on its determination that the decision to grant hospital staff privileges was "a necessary assurance of good health care" and thus part of a "rendering of 'professional services[.]' " *Id.* at 446–47.

81. The Court of Appeals revisited the learned profession exception in *Wheeless*, *supra*, in which it held that there could be no UDTP liability predicated on allegations that a hospital and members of its executive committee and board of directors accessed, shared, and reviewed peer review materials and patient medical records of a surgeon and former employee. The Court of Appeals ruled that hospitals and their administrators qualify as "medical professionals" and that the conduct of which the surgeon complained was "integral" to "ensuring the provision of adequate medical care." *Wheeless*, 237 N.C. App. at 590–91.

82. This Court dismissed a UDTP claim based on the learned profession exception in *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 63, at *20–25 (N.C. Super. Ct. Oct. 10, 2019). The claim was brought by a group of individual anesthesiologists who had agreed to a consolidation of their respective practices against the company into which their practices had been consolidated and its parent company, alleging misappropriation of funds and deception in the negotiations and execution of various contracts. *Id.* at *5–11. We rejected the argument that the exception was inapplicable simply because the challenged conduct did not occur while any of the doctors at issue were actually practicing medicine. *Id.* at *23. We explained that (1) the applicability of the learned profession exception does not depend on whether the defendant was "actively engaged in the practice" of the relevant profession at the time of the challenged conduct; and (2) "the exception has been held to apply to [similar] alleged unfair and deceptive conduct . . . [such as] allegedly 'anticompetitive conduct involving commercial activity.' " *Id.* at *23–24 (quoting *Cameron*, 58 N.C. App. at 446–47).

83. This Court also relied on the learned profession exception in *Alamance Family Practice, P.A. v. Lindley*, 2018 NCBC LEXIS 83 (N.C. Super. Ct. Aug. 14, 2018). In that case, the former employer of a nurse practitioner alleged that she had engaged in unlawful competition in violation of N.C.G.S. § 75-1.1 leading up to and following the termination of her employment by obtaining patient data, using that data to solicit patients, paying unauthorized personal expenses, and attempting to provide a doctor with kickbacks for patient referrals. *Id.* at *22–24. However, in light

of the fact that all of the anticompetitive conduct that the plaintiff alleged "related to the provision of allergy testing services and communications with patients[,]" we concluded the claim "f[e]ll[] within the learned profession exemption." *Id.* at *25.

84. Based on the cases discussed above, it is clear that Plaintiff's UDTP claim here likewise falls squarely within the learned profession exception.

85. Although Plaintiff couches this claim as one arising from a business dispute, he cannot ignore the fact that issues involving the provision of medical care permeate every aspect of this lawsuit. Indeed, the proposed SAC focuses to a significant degree on the effect of Defendants' actions on Plaintiff's patients. Moreover, in Plaintiff's response brief, he expressly concedes that "CUP and Natale, with their misconduct, unquestionably affected the medical care of [Plaintiff's] patients." (Pl.'s Br. Opp'n Defs.' Mot. Dismiss, ECF No. 34, at 22.) *See also, e.g.*, SAC ¶ 112 ("Defendants made minimal, if any, efforts to individually reach out to patients, reschedule their appointments, or ensure they received proper follow-up care."); *id.* ¶ 114 ("Defendants did not successfully contact patients to make sure they checked their email, that their email addresses were correct, or that the patients had access to email accounts at all."); *id.* ¶ 122 ("Defendants failed to inform [Plaintiff's] patients that there would be a gap in their care. . . . The actions of Defendants reflect total disregard for the provision of quality medical care[.]").

86. Finally, the Court is not persuaded by Plaintiff's argument that even if the learned profession exception applies to CUP and Dr. Natale, it is inapplicable to

Clair because she is not a physician. As a leading treatise on UDTP claims in North Carolina notes,

> [t]he courts have taken a very broad reading of the exemption, including not only physicians (doctors) but also hospitals and their administrators. The courts have also extended the exemption beyond the professional services rendered by learned professionals to include basically competitive commercial decisions by hospital administrators in relation to competition and business relations with competitors and suppliers.

1 North Carolina Unfair Business Practice § 14.03 (2023); *see also Cameron*, 58 N.C. App. 414, 446–47 (defendant's obligations in administering hospital qualified as rendering of professional services under N.C.G.S. § 75-1.1(b)). This same logic applies to someone in the position of Clair.

87. Accordingly, Defendants' Partial Motion to Dismiss is **GRANTED** with respect to Plaintiff's UDTP claim.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Plaintiffs' Motion to Amend is **GRANTED**.

2. Defendants' Partial Motion to Dismiss is **DENIED** as to Plaintiff's claim for fraud.

3. Defendants' Partial Motion to Dismiss is **GRANTED** with respect to Plaintiff's UDTP claim, and that claim is **DISMISSED** with prejudice.

4. Plaintiff is **DIRECTED** to file **within seven days** a Second Amended Complaint in the form attached to the Motion to Amend,

except that the Second Amended Complaint shall not contain a claim for UDTP in light of the Court's dismissal of that claim herein.

SO ORDERED, this the 20th day of February, 2024.

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