Loyd v. Griffin, 2023 NCBC 26.

STATE OF NORTH CAROLINA IREDELL COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 2394
ASHTON K. LOYD, Plaintiff, v. JAMES MICHAEL GRIFFIN and GRIFFIN INSURANCE AGENCY, INC., Defendants.	**ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

1. **THIS MATTER** is before the Court on the 6 June 2022 filing of Defendants James Michael Griffin ("Mr. Griffin") and Griffin Insurance Agency, Inc.'s ("GIA" and together, "Defendants") Motion for Summary Judgment, (ECF No. 98 ["Defs.' Mot."]), and Plaintiff Ashton K. Loyd's ("Mr. Loyd" or "Plaintiff") Motion for Partial Summary Judgment (together, the "Cross-Motions for Summary Judgment"), (ECF No. 100 ["Pl.'s Mot."]). Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), Defendants request summary judgment on all of Plaintiff's claims and affirmative summary judgment on three of their Counterclaims. (Defs.' Mot.) Plaintiff requests summary judgment on five of Defendants' Counterclaims. (Pl.'s Mot.)

2. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Cross-Motions for Summary Judgment.

Levine Law Group, P.A. by Michael J. Levine and Cathy A. Williams, Austin Law Firm by John S. Austin, and Mauney PLLC by Gary V. Mauney, for Plaintiff Ashton K. Loyd.

Bennett & Guthrie, PLLC by Mitchell H. Blankenship and Joshua H. Bennett, for Defendants James Michael Griffin and Griffin Insurance Agency, Inc.

Robinson, Judge.

I. INTRODUCTION

3. This matter arises out of circumstances related to Mr. Griffin and Mr. Loyd's respective insurance agencies, and the later merger of their businesses. Throughout their business relationship, the pair and their respective insurance agencies executed a number of agreements, and this dispute centers around the alleged violations of several of those agreements. At the heart of the dispute are events relating to those documents, and the merger of Loyd Insurance Agency, Inc. into GIA, including: Mr. Loyd's employment with GIA; his alleged issuance of false or misleading certificates of insurance, and subsequent termination; Mr. Loyd's alleged retention of his GIA shares following that termination; and the ultimate sale of GIA, among others.

4. After completing extensive discovery and briefing, the Cross-Motions for Summary Judgment request dismissal of the twelve remaining claims and counterclaims in this matter.

II. FACTUAL BACKGROUND

5. The Court does not make findings of fact when ruling on motions for summary judgment. "[T]o provide context for its ruling, the Court may state either those facts that it believes are not in material dispute or those facts on which a material dispute forecloses summary adjudication." *Ehmann v. Medflow, Inc.*,

2017 NCBC LEXIS 88, at *6 (N.C. Super. Ct. Sept. 26, 2017); *see also Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975) (encouraging the trial court to articulate a summary of the relevant evidence of record to provide context for the claims and the motion(s)).

6. Mr. Loyd is a citizen and resident of Mooresville, Iredell County, North Carolina. (Second Am. Compl. ¶ 16, ECF No. 83 ["SAC"].) Mr. Loyd founded Loyd Insurance Agency, Inc. ("LIA"), a North Carolina corporation, and he later became a minority shareholder in and vice president of GIA, (SAC ¶¶ 16, 32).[1]

7. Defendant GIA is a North Carolina corporation with its principal office located at 135 Gasoline Alley, Mooresville, Iredell County, North Carolina. (SAC ¶ 18.) Mr. Griffin is a citizen and resident of Cornelius, Mecklenburg County, North Carolina, and was the majority shareholder and president of GIA. (SAC ¶ 17.) Mr. Griffin remained GIA's president at all relevant times. (J.A. 1175.)[2]

A. <u>The Formation of GIA</u>

8. On 29 June 2001, GIA was incorporated in North Carolina. (J.A. 1486.)

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[1] The Second Amended Complaint was verified by Mr. Loyd on 6 June 2022, contemporaneous with the filing of the Cross-Motions for Summary Judgment, with the verification appearing in the Joint Appendix. (J.A. 2604–05.) A verified complaint "may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705 (1972). Therefore, the Court may treat and accept the fact-based portions of the verified Second Amended Complaint as an affidavit of Mr. Loyd.

[2] The Joint Appendix, containing the materials relevant to each side's motion for summary judgment, was electronically filed in ten parts but is consecutively paginated. (*See* ECF Nos. 118–27.) For brevity, the Court uses an abbreviated citation as follows, (J.A. [page no.], [page no.]). Depositions are cited using the Joint Appendix pagination and include the ECF No. only in the first full cite, ([Dep. name], [J.A. page:line–J.A. page:line], [ECF No.]).

9. The Initial Resolutions of GIA provided that Mr. Griffin would be the sole initial shareholder of GIA, holding 1500 shares, and that he would be its president. (J.A. 1905–06.) The Initial Resolutions also stated that the Board of Directors of GIA elected for it to be an S Corporation. (J.A. 1908.) Mr. Griffin was also the CEO, and, according to the GIA Bylaws, in that capacity he had "general charge of the business, affairs, and property of the Corporation and control over its other officers, agents[,] and employees." (J.A. 1914.) By 2010, GIA had several separate locations, including at least the office located at 227 West Plaza Drive, Mooresville, North Carolina (the "West Plaza Location"). (J.A. 314.)

10. In 2004, Mr. Griffin hired Mr. Loyd as an associate agent for GIA to sell Nationwide Mutual Insurance Company's ("Nationwide") insurance products. (J.A. 1175; Dep. Ashton K. Loyd Oct. 15, 2021, 14:4–6, ECF No. 118 ["Loyd Dep. Oct. 2021"].) In his early years working at GIA, Mr. Loyd was an employee who received a Form W-2 tax statement, and he did not hold shares in the corporation. (J.A. 1175–76.) While Mr. Loyd began as an associate agent for GIA, Mr. Griffin believed that Mr. Loyd was likely to be his "successor" at GIA. (*See* Loyd Dep. Oct. 2021, 23:25–24:3; Dep. James M. Griffin 1194:2–5, ECF No. 120 ["Griffin Dep."].)

B. <u>Formation of LIA and the Revenue Stream Purchase Agreements</u>

11. Mr. Loyd formed LIA in 2009 at the direction of Mr. Griffin and GIA's certified public accountant ("CPA"), John Potts. (SAC ¶ 32.) The Articles of Incorporation for LIA were filed with the North Carolina Secretary of State on 31 March 2010, (SAC ¶ 32), and Mr. Loyd was at all times the sole owner and

shareholder of LIA, (Dep. Ashton K. Loyd Apr. 22, 2022, 404:13–405:4, ECF No. 118 ["Loyd Dep. Apr. 2022"]).

12. On 1 March 2010, Mr. Griffin, Mr. Loyd, and LIA executed a Revenue Stream Purchase Agreement ("RSPA") for the West Plaza Location (the "West Plaza RSPA"). (J.A. 314.) The record demonstrates that in 2010, Nationwide's contract with Mr. Griffin and GIA provided that, as an exclusive agent of Nationwide, they owned the revenue rights to the agency but not the renewal rights or the book of business. (Griffin Dep. 1199:1–18.) Pursuant to the West Plaza RSPA, Mr. Griffin agreed to transfer to Mr. Loyd his right to receive the revenue generated from the sale of Nationwide insurance policies at the West Plaza Location.[3] (J.A. 314.) Mr. Loyd purchased those rights for $1,258,276.58 plus interest to be paid over the course of roughly 14 years, with full payment by August 2024, pursuant to the Purchase Price Allocation schedule. (J.A. 314–15, 326–31.)

13. Mr. Griffin, Mr. Loyd, and LIA also executed a second RSPA for the GIA office located at 125 East Front Street, Statesville, North Carolina (the "Statesville Location RSPA") on 1 March 2010. (J.A. 333–41.) This RSPA functioned the same as the RSPA applicable to the West Plaza Location. Mr. Loyd agreed to pay

[3] Mr. Loyd testified that the purpose of the RSPAs was to purchase the revenue streams for the GIA locations, meaning the sale of Nationwide property and casualty insurance products, including bonuses earned by meeting productivity requirements, such that he would ultimately own the revenue generated at those locations. (Loyd Dep. Oct. 2021, 38:14–39:25 (comparing the RSPAs to a mortgage on a house); J.A. 314.) The RSPAs functioned as an assignment from Mr. Griffin to Mr. Loyd of his right to receive the revenue at each applicable location. (J.A. 1176.)

$219,262.00 plus interest, beginning 1 May 2012, for the rights under the second RSPA over the course of ten years. (J.A. 333.)

14. On 1 July 2012, GIA, LIA, and Mr. Loyd executed three agreements, though only GIA was a party to all three: (1) the Corporate Associate Agent Agreement; (2) an Employment Agreement; and (3) the Agency Associate Agent/Office Staff Agreement. The order in which those agreements were signed is not clear from the evidence in the record.

15. The Corporate Associate Agent Agreement (the "CAA Agreement") was between LIA and GIA whereby LIA became an "associate agent" and "independent contractor" of GIA. (J.A. 294, 301.) The CAA Agreement permitted LIA to sell Nationwide insurance as an agent of GIA at its West Plaza and Statesville Locations. (J.A. 294, 312.) However, LIA's employees and independent contractors were not employees or independent contractors of GIA.[4] (J.A. 301.)

16. The Employment Agreement was between Mr. Loyd and GIA, naming Mr. Loyd an "employee" of it, and providing that Mr. Loyd would hold the position of "insurance agency [sic]" of GIA and would work primarily out of the West Plaza Location. (J.A. 594.) It further stated that "[t]his document contains the entire understanding and agreement between the Employer and [Employee] hereto and supersedes all other oral and written agreements or understanding[s] between us.

[4] The CAA Agreement provided that it was "not intended to, and does not, create a franchise relationship between [the parties] and . . . the sole relationship established between them under the terms and conditions of this Agreement is one of agency." (J.A. 301.)

No modification or addition . . . shall be valid except in writing, signed by both the Employer and [Employee]." (J.A. 594.)

17. Finally, the Agency Associate Agent/Office Staff Agreement (the "Associate Agent Agreement") was between Nationwide, Mr. Loyd, and GIA, naming Mr. Loyd an Associate Agent of Nationwide, and describing his privileges and requirements as such. (J.A. 2546–50.) The Associate Agent Agreement provided that Mr. Loyd would "represent Nationwide exclusively in the sale and service of insurance and financial products" and "comply with all applicable insurance laws and regulations." (J.A. 2547.)

18. On 1 October 2017, GIA and LIA executed a third and final RSPA for the GIA office at 7505 Hwy 73, Suite F, Denver, North Carolina (the "Denver Location"). (J.A. 1101–04.) The Denver Location RSPA provided that LIA would pay $304,034.00 plus interest, in equal monthly installments of $3,225.00, beginning on 1 February 2018. (J.A. 1101–02.)

C. <u>The Merger of LIA with GIA</u>

19. In 2018, while Mr. Loyd was paying for his purchase of the revenue rights to three GIA locations, Nationwide announced a plan to allow agents to purchase their business, rendering the three RSPAs ineffective for their original purpose of providing Mr. Loyd with the revenue rights to each location. (Griffin Dep. 1194:21–1196:14.) Subsequently, Mr. Griffin purchased GIA's book of business, and believed it was best to give Mr. Loyd a "credit for the principal" paid on the GIA revenue rights by making him a shareholder of GIA. (Griffin Dep. 1195:21–1196:8.) The parties

agree that these events sparked the merger of LIA and GIA. (*See* Loyd Dep. Apr. 2022, 482:23–484:21; Griffin Dep. 1195:8–1197:2.)

20. On 12 June 2018, there was a special meeting of the Board of Directors and Shareholders of GIA where Mr. Loyd was appointed vice president and Mr. Griffin remained president. (J.A. 965.)

21. On 25 June 2018, LIA and GIA executed the Agreement and Plan of Merger Between GIA and LIA (the "Merger Agreement"). (J.A. 345–51.) The Merger Agreement, effective on 1 July 2018, governed the merger of LIA into GIA such that the "individual existence of [LIA] shall cease", with the stock ownership of LIA being converted into the stock ownership of GIA. (J.A. 345.) Upon the merger contemplated in the agreement, the shareholders of GIA would be Mr. Griffin holding 74% of the outstanding stock and Mr. Loyd holding 26% of the outstanding stock. (J.A. 346.) Further, it provided that "[t]he Sole Shareholder of [LIA] agrees to execute the [GIA] Shareholders' Agreement on the Effective Date of the Merger." (J.A. 347.)

22. In Section 8(g) of the Merger Agreement, LIA "represents and warrants to [GIA]" that it "has complied with and is not in default in any material respect under any laws, ordinances, requirements, regulations, or orders applicable to its business." (J.A. 349.) GIA warranted the same, and pursuant to Section 14 of the Merger Agreement, each entity agreed that those warranties would survive beyond 1 July 2018. (J.A. 349–51.)

23. Mr. Loyd, and Mr. Griffin, as trustee of the J. Michael Griffin Revocable Trust (the "Griffin Trust"), also executed the GIA Shareholders' Agreement on

25 June 2018 (the "25 June 2018 Shareholders' Agreement"). (J.A. 352.) The agreement provided in relevant part:

> 1. Right of First Refusal. Any Shareholder desiring to transfer his Shares of the Corporation . . . must give notice (the "Notice") of his intent to transfer in writing to the Corporation and to the remaining Shareholders at least sixty (60) days before the date of the proposed transfer.
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> 3. Corporate Purchase. Upon . . . (iii) the termination of the Shareholder's employment with the Corporation *for any reason* (collectively referred to as a 'Triggering Event'), the Shareholder or his estate will sell, and the Corporation will purchase, at the Purchase Price . . . all of the shares owned by the Shareholder at the time of the Triggering Event[.]
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> 4. Purchase Price. Purchase Price [is determined by formula stated herein, and] may be reviewed periodically by all of the Shareholders and may be revised upon each review on the basis of the then existing business and financial condition and prospects of the Corporation. The good faith decision of a majority in interest of such Shareholders upon each such review shall be conclusive; and each such decision shall be noted in writing and endorsed by each such Shareholder.
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> 11. Limitations on Sale. No purchase or sale shall be effective hereunder if any of the following occurs: . . . (c) The Shareholders have amended this Agreement.
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> 12. Amendment. All provisions of this Agreement shall be effective until changed by the mutual consent of all the Shareholders, except as otherwise provided by law.

(J.A. 352–54, 356 (emphasis added).)

24. Mr. Loyd described the merger of LIA into GIA as a "hostile takeover", stating that he "had no input" in the agreement. (Loyd Dep. Apr. 2022, 412:1–16.)

Mr. Loyd "certainly had objections" and raised issues with Mr. Griffin regarding the value of the property transferred by LIA to GIA as a result of the merger and the revenue splitting that would result from it. (Loyd Dep. Apr. 2022, 412:19–415:4.) Mr. Loyd also stated that, "at the end of the day I still wanted to put my head down and go to work and . . . I still thought that I saw the finish line. I still thought that I saw that succession that had been promised to me over the years[.]" (Loyd Dep. Apr. 2022, 414:25–415:4.)

D. <u>The Merger of Patton Insurance Agency, Inc. with GIA</u>

25. Following the merger of LIA into GIA, GIA initiated a merger with Patton Insurance Agency, Inc. ("Patton Insurance"), whose president was Andrew S. Patton ("Mr. Patton"). (*See* Loyd Dep. Apr. 2022, 418:9–20; J.A. 571.) Prior to that merger, Mr. Patton and Mr. Loyd spoke about Mr. Patton joining the company and whether he would "be a good fit." (Loyd Dep. Apr. 2022, 418:24–419:15.) Mr. Loyd testified that he "certainly thought he would." (Loyd Dep. Apr. 2022, 419:13–14.)

26. Defendants contend that on 30 November 2018, Patton Insurance and GIA executed the Agreement and Plan of Merger Between GIA and Patton Insurance (the "Patton Merger Agreement").[5] (J.A. 565.) The Patton Merger Agreement provided that "the sole shareholder of Patton [Insurance] agrees to execute the [GIA] Shareholders' Agreement on the Effective Date of the Merger." (J.A. 567.) The merger of Patton Insurance into GIA was effective 1 December 2018, with the shareholders of GIA becoming, according to the terms of that agreement, Mr. Griffin

[5] Mr. Loyd did not sign or otherwise execute the Patton Merger Agreement, and there was no space printed on the agreement for him to sign. (J.A. 571.)

with 66%, 8% less than his ownership percentage prior to that merger, Mr. Loyd with 23%, 3% less than his prior ownership percentage, and Mr. Patton with 11% of the outstanding shares. (J.A. 566.)

27. According to Mr. Loyd, "[t]here was no vote" on the merger between Patton Insurance and GIA. (Loyd Dep. Apr. 2022, 478:13–479:2.) Mr. Griffin, however, contends that he, Mr. Loyd, and Mr. Patton *did* vote on "whether or not to admit Andrew Patton as a shareholder[.]"[6] (Griffin Dep. 1211:12–20.)

28. An unsigned copy of the purported Shareholders' Agreement dated 1 December 2018 (the "Unsigned December 2018 Shareholders' Agreement") was included in the Joint Appendix. The Unsigned December 2018 Shareholders' Agreement has spaces for Mr. Griffin, Mr. Loyd, and Mr. Patton to sign, but there is conflicting evidence in the record regarding whether this document was ever signed by any of them, and it is contested whether it was ever effective. (J.A. 2973–78.)

29. Mr. Loyd testified that "Mr. Patton became a signatory to" the GIA Shareholders' Agreement.[7] (*See* SAC ¶¶ 107, 181(d); Loyd Dep. Apr. 2022, 458:9–

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[6] Mr. Loyd contends that he "had no choice in the matter." (Loyd Dep. Apr. 2022, 445:22–446:2.) This is directly contradictory to Mr. Griffin's view, as he stated that they "were in constant contact with each other. We both knew that we were getting ready to enter into a merger with Mr. Patton, had discussed at length and . . . ad nauseam." (Griffin Dep. 1246:10–17.)

[7] At Mr. Loyd's 22 April 2022 deposition, he was questioned about the allegation in the Second Amended Complaint of an amendment to the June 25 Shareholders' Agreement. (*See* SAC ¶¶ 107, 181(d).) Specifically, he was asked:

> Q: The complaint also alleges that the shareholder agreement . . . was amended because Mr. Patton became a signatory to it. Is there any other amendment of the agreement that you are aware of?
> A: I'm not.

460:12.) Mr. Griffin agreed that "Mr. Patton was subsequently included as an additional signatory to the shareholder agreement[.]"[8] (Griffin Dep. 1263:10–16.) Notwithstanding the apparent agreement in the record that Mr. Patton was added as a shareholder of GIA, and that he became a "signatory" to the 25 June 2018 Shareholders' Agreement, evidenced by the Unsigned December 2018 Shareholders' Agreement, there is no GIA shareholders' agreement in the record before the Court which contains Mr. Patton's signature.

E. Share Ownership in GIA at Each Merger

30. Prior to merging LIA into GIA, Mr. Griffin held the only outstanding shares of GIA, 1000 shares, out of the total authorized 1500 shares. (J.A. 1499–1500.) Inexplicably, however, the GIA share certificates and transfer records (the "GIA Share Records") demonstrate that on 1 September 2013, 1500 shares, not 1000, were transferred by Mr. Griffin to himself as trustee of the Griffin Trust.[9] (J.A. 1501.) On

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> Q: So, then, somewhere out there, there is this same agreement with Andy Patton's signature on it?

Mr. Loyd did not provide a direct response to this question. (Loyd Dep. Apr. 2022, 458:9–460:12.) As previously indicated, Mr. Loyd verified this pleading.

[8] At Mr. Griffin's deposition, he testified that it was his belief that on 1 December 2018, the 25 June 2018 Shareholders' Agreement was amended to include Mr. Patton. (Griffin Dep. 1263:17–1264:5, 1361:25–1362:10.)

[9] The certificates in the record appear to have several discrepancies. For example, on certificate four of the GIA Share Records, representing the 990 shares retained by the Griffin Trust, it lists the original certificate as number two. (J.A. 1502.) However, certificate two represents 500 shares issued to Charles E. Moore, III and then redeemed by the corporation. (J.A. 1500.) Therefore, the evidence is not conclusive as to exactly how many shares Mr. Griffin may have held in the Griffin Trust at the time of the mergers with LIA or Patton Insurance. The evidence is also inconclusive as to how Mr. Griffin went from owning 1000 shares in GIA to owning 1500 shares.

1 December 2018, 990 of those shares were retained in the Griffin Trust, and it was given a new certificate to represent those shares. (J.A. 1501–02.) The same day, 345 shares were issued to Mr. Loyd and 165 shares to Mr. Patton. (J.A. 1503–04.)

31. The Merger Agreement provides, by its terms, that when LIA merged into GIA, Mr. Loyd was to be issued 26% of the outstanding shares of GIA. (J.A. 346.) The evidence in the record demonstrates that, at that time, 1500 shares were outstanding and held in the Griffin Trust. (J.A. 346; Griffin Dep. 1237:12–24, 1239:3–10, 1244:2–3.)

32. There is no indication in the GIA Share Records of Mr. Loyd being issued 390 shares, or any of Mr. Griffin or Mr. Loyd's shares being transferred to Mr. Patton following the merger of Patton Insurance into GIA. The evidence in the record does not disclose how Mr. Loyd's 390 shares were reduced to 345 shares, given that the Patton Merger Agreement states Mr. Loyd held 23% of the outstanding shares. (*See* J.A. 2967.) Mr. Loyd testified that he did not consent to three percent of his stock being transferred to Mr. Patton. (Loyd Dep. Apr. 2022, 479:22–480:2.) Further, Mr. Loyd testified that there was no vote on the reduction of his stock ownership, that he had "no say" in the redistribution of his shares, and that he was not paid for a reduction in his ownership.[10] (Loyd Dep. Apr. 2022, 480:24–481:18.)

[10] Defendants contend that no separate payment to Mr. Loyd was necessary for the transfer of 45 of his shares to Mr. Patton because Patton Insurance owned substantial assets which became a part of GIA after the merger. (Defs.' Br. Opp. Pl.'s Mot. 11, ECF No. 129 (citing Loyd Dep. Apr. 2022, 420:2–22, J.A. 964).) Thus, while Mr. Loyd owned a smaller number of shares of GIA, the value of GIA increased after the merger of Patton Insurance into GIA, and each share was worth more after the merger. (Loyd Dep. Apr. 2022, 420:2–22, J.A. 964.)

F. Negotiations for the Sale of GIA and the Investigation into False Certificates of Insurance

33. Around fall 2019, Mr. Griffin began preliminary discussions with various parties that were interested in acquiring GIA. (Griffin Dep. 1277:1–19.) On 28 January 2020, Relation Insurance, Inc. ("Relation") sent a Letter of Intent ("LOI") to Mr. Griffin expressing its interest in the possible acquisition of GIA. (J.A. 1807.) On 4 February 2020, Leavitt Group Enterprises ("Leavitt Group") sent a LOI to Mr. Griffin, also expressing interest in acquiring GIA. (J.A. 881, 1815.) Both LOIs were nonbinding expressions of interest, and did not legally require the parties thereto to proceed with the transactions contemplated therein. (J.A. 1813, 1820.) Relation mailed an additional LOI to Mr. Griffin on 12 February 2020, raising the potential total consideration for the purchase of GIA. (J.A. 1826.)

34. That same month, Mr. Griffin became aware that Mr. Loyd may have directed GIA employees to issue Certificates of Insurance ("COIs") containing false or inaccurate information.[11] (J.A. 1177.) On or about 13 February 2020, Mr. Griffin notified Nationwide's then-Associate Vice President of Sales for North Carolina, Doug Penley ("Mr. Penley"), that he "had some concerns regarding potentially false and/or inaccurate certificates of insurance generated and/or issued by individuals within

[11] A COI is a form issued by an insurance agency or company evidencing the existence of an insurance policy and providing further information about the owner of the policy, the types of coverage, and any additional insureds under the policy. (*See* Dep. Brent Winans, 622:23–623:6, ECF No. 118.) Nationwide considers a COI to be "false and/or inaccurate" if it is either: "(1) referencing policies that did not exist; (2) misrepresenting specific coverage limits; (3) referencing personal lines of insurance policies despite being certificates of insurance intended for commercial lines policies; and/or (4) containing additional insureds and/or waivers of subrogation that had not been previously approved by Nationwide[.]" (J.A. 996.)

GIA." (J.A. 995.) Nationwide thereafter sent its investigator Clarke Dean Langfitt ("Mr. Langfitt") to GIA to further investigate "whether individuals at GIA had generated certificates of insurance containing false and/or inaccurate information." (J.A. 995, 1177.)

35. On 28 February 2020, Mr. Langfitt conducted recorded phone interviews with Mr. Loyd and GIA employees Charlotte Kincaid, Corinne Meyers, and Shana Boehme Vielie. (*See* J.A. 685–822, 995.) During Mr. Langfitt's interview with Mr. Loyd, Mr. Loyd admitted to instructing GIA employees to create false or misleading COIs, and to personally issuing or generating at least one false or misleading COI. (J.A. 686, 995.) Charlotte Kincaid, Corinne Meyers, and Shana Boehme Vielie each stated that they issued and/or generated false or misleading COIs, and that they did so at Mr. Loyd's request. (J.A. 995.) At the conclusion of his investigation, Mr. Langfitt found that: (1) "Loyd admitted to directing his staff at GIA to create false [COIs] approximately twelve (12) times starting three or four years [prior to the interview]"; (2) "Kincaid admitted to preparing approximately fifty (50) false [COIs] . . . at the direction of Loyd"; (3) "Meyers admitted to creating between ten (10) and fifteen (15) false [COIs] . . . at the direction of Loyd"; and (4) "Vielie admitted to creating one false [COI] in 2017 at the direction of Loyd." (J.A. 996.)

36. On 28 February 2020, the day after Mr. Langfitt conducted these interviews, Relation mailed a third LOI for the acquisition of GIA. (J.A. 873.) Both Mr. Loyd and Mr. Patton were in favor of this transaction. (J.A. 867.) The pair approved of the part-equity option, and Mr. Loyd called it a "really exciting

opportunity." (J.A. 867.) Mr. Griffin ultimately signed that Relation LOI. (J.A. 1836–42.)

37. Following Mr. Langfitt's investigation, on 10 March 2020, Mr. Penley emailed Mr. Griffin confirming that Mr. Loyd admitted to directing GIA staff to create false or misleading COIs. (J.A. 862.) On 11 March 2020, Nationwide cancelled the appointments of Mr. Loyd, Charlotte Kincaid, Corinne Meyers, and Shana Boehme Vielie, and the four were no longer authorized to sell Nationwide insurance products. (J.A. 996, 1107.) GIA terminated Mr. Loyd's employment the same day.[12] (J.A. 1107.)

38. On 12 March 2020, Mr. Griffin purportedly held a special meeting of the directors and shareholders of GIA, and notice of the meeting to GIA shareholders was waived by him. (J.A. 1551–52.) Pursuant to a printed agenda for the special meeting, Item II for discussion was the dismissal of Mr. Loyd "due to actions inconsistent with accepted insurance practices", specifically "the issuance of numerous false [COIs]." (J.A. 1552.) It was resolved at the meeting that the "officers and [d]irectors of [GIA] are authorized to exercise the option in the [Shareholders' A]greement to repurchase the outstanding shares of stock possessed by Mr. Loyd." (J.A. 1552.) The evidence in the record demonstrates that Mr. Griffin was the only GIA shareholder at the meeting, and that the only other attendee was Jacqueline Sipe, who was an officer but not a shareholder. (J.A. 1552–53.) Mr. Loyd testified that he was not provided

[12] Following an investigation by the North Carolina Department of Insurance (the "NCDOI"), Mr. Loyd signed a Voluntary Surrender of License or Licenses (N.C.G.S. § 58-2-65), thereby surrendering all licenses issued to him by the NCDOI, which authorized him to sell insurance policies, for 20 years. (J.A. 382.) The form provides an acknowledgement that the voluntary surrender is "equivalent to the taking of a regulatory action by [the]NCDOI." (J.A. 382.)

notice of the meeting or an opportunity to participate. (Loyd Dep. Apr. 2022, 486:9–23.) He further denied ever signing any agreement transferring his shares of GIA to the company and testified that he opposed the sale of his shares pursuant to the terms of the 25 June 2018 Shareholders' Agreement. (Loyd Dep. Apr. 2022, 487:7–16.)

39. While there is a GIA Severance Agreement and a Stock Redemption Agreement in the record, neither of those documents were executed by the parties. (J.A. 1107–16.) Mr. Griffin contends that Mr. Loyd's shares in GIA were "retired" upon the termination of his employment with GIA. (Griffin Dep. 1466:12–1467:11.) Mr. Loyd did not sign any consents, agreements, or other documents, agreeing to sell his shares in GIA back to it or otherwise "retire" his shares. (Loyd Dep. Apr. 2022, 487:2–16.)

40. On 20 May 2020, Mr. Griffin withdrew from the Relation LOI due to "unforeseen circumstances" involving Mr. Loyd which "caused considerable stress" to Mr. Griffin and GIA's employees. (J.A. 1846.) Mr. Griffin "was not interested in going forward with Relation" so he "voluntarily withdrew" from the LOI. (Griffin Dep. 1296:3–15, 1311:7–11.)

41. On 2 September 2020, counsel for Mr. Loyd at Levine Law Group, PA received a letter regarding GIA's intention to begin payments to Mr. Loyd pursuant to the terms of the 25 June 2018 Shareholders' Agreement, stating "GIA will no longer wait for Mr. Loyd to cooperate with the signing of the Stock Redemption [documents] because GIA must move forward as a business and plan for its future." (J.A. 1030–32, 1112–16.) The letter provided that Mr. Loyd would receive a calculated amount

for his stock that included substantial discounts based on lack of marketability and minority interest. (J.A. 1030–32.)

G. Subsequent Negotiations for the Sale of GIA

42. Mr. Griffin began re-negotiating the sale of GIA shortly after it withdrew from the Relation LOI. On 29 September 2020, Leavitt Group mailed a LOI to Mr. Griffin and Mr. Patton for the potential purchase of GIA. (J.A. 1857.) Ultimately, on 31 December 2020, GIA and Leavitt Group reached an agreement for the purchase of 1155 outstanding shares of GIA. (J.A. 982.)

III. PROCEDURAL HISTORY

43. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Cross-Motions for Summary Judgment.

44. On 25 September 2020, Mr. Loyd initiated this action upon the filing of the Complaint. (ECF No. 3.) The Complaint included claims for breach of fiduciary duty; tortious interference with Plaintiff's business; rescission of the 25 June 2018 Shareholders' Agreement; unjust enrichment; accounting pursuant to N.C.G.S. § 59-52 *et seq*.; and punitive damages. (ECF No. 3.)

45. Defendants filed an answer and counterclaims on 25 November 2020. (ECF No. 14 ["Countercls."].) Defendants' counterclaims included seven affirmative claims for relief: (1) breach of fiduciary duty ("Counterclaim One"); (2) breach of contract, breach of warranty under the Merger Agreement ("Counterclaim Two"); (3) fraud ("Counterclaim Three"); (4) rescission of the Merger Agreement and 25 June 2018 Shareholders' Agreement; (5) violations of the North Carolina Unfair and Deceptive

Trade Practices Act ("UDTPA"), N.C.G.S. § 75-1.1 *et seq*. ("Counterclaim Five"); (6) breach of contract for the Associate Agent Agreement ("Counterclaim Six"); and (7) breach of contract seeking specific performance of the 25 June 2018 Shareholders' Agreement ("Counterclaim Seven"). (*See* Countercls.) Count Four of Defendants' Counterclaims seeking rescission of the Merger Agreement was voluntarily dismissed without prejudice on 19 January 2021 and was not refiled. (ECF No. 30.)

46. Plaintiff filed a motion to dismiss the Counterclaims on 28 January 2021, as well as his reply to the Counterclaims. (ECF Nos. 32, 34.) The Court denied Plaintiff's motion to dismiss in its entirety on 1 September 2021. *See Loyd v. Griffin*, 2021 NCBC LEXIS 72 (N.C. Super. Ct. Sept. 1, 2021).

47. Following the Court's Order on Plaintiff's Consent Motion to Amend Complaint, Plaintiff filed the Amended Complaint on 11 January 2021. (ECF Nos. 28–29.) On 10 November 2021, Plaintiff filed his Motion for Leave to File a Second Amended Complaint, which sought in part to change the claims for relief against Defendants. (ECF No. 71.) On 25 January 2022, the Court, in its discretion, granted the motion in part, allowing Mr. Loyd to file the Second Amended Complaint, but disallowing a claim for declaratory judgment against Defendants. (ECF No. 82.) In compliance with the Court's Order, Mr. Loyd filed the Second Amended Complaint on 1 February 2022. (*See* SAC.) The Second Amended Complaint, as filed, contained claims for: breach of fiduciary duty against Mr. Griffin; constructive fraud against Mr. Griffin; conversion against Defendants; unjust enrichment against Defendants;

constructive trust and accounting against Defendants; the alternative remedy of rescission; and punitive damages. (SAC ¶¶ 172–223.)

48. Defendants filed the Motion to Dismiss Plaintiff's Second Amended Complaint on 3 March 2022, seeking dismissal of all seven claims for relief. (ECF No. 87.) Defendants filed an answer the same day. (ECF No. 89.)

49. After full briefing by the parties and a hearing on the motion to dismiss, the Court dismissed Mr. Loyd's claims for constructive trust and accounting, rescission, and punitive damages. *Loyd v. Griffin*, 2022 NCBC LEXIS 63, at **32 (N.C. Super. Ct. June 23, 2022). Four of Mr. Loyd's claims for relief remain: (1) breach of fiduciary duty against Mr. Griffin ("Count One"); (2) constructive fraud against Mr. Griffin ("Count Two"); (3) conversion against Defendants ("Count Three"); and (4) unjust enrichment against Defendants ("Count Four").

50. Following the completion of discovery, the parties filed their respective motions for summary judgment on 6 June 2022. Defendants request summary judgment on Plaintiff's four remaining claims and affirmative summary judgment on Counterclaims One, Five, and Seven.[13] Plaintiff requests summary judgment on Counterclaims Two, Three, Five, Six, and Seven.

51. After full briefing by the parties, hearings were held on the Cross-Motions for Summary Judgment on 9 November 2022 and 30 November 2022 (the "Hearings") where all parties were present and represented by counsel. (*See* ECF Nos. 131–32.)

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[13] While Defendants address Plaintiff's claims for constructive trust and accounting, rescission, and punitive damages in their summary judgment briefing, those claims were dismissed at the Rule 12(b)(6) stage, and therefore are not addressed herein. Plaintiff does not dispute that these claims were dismissed and did not address them in the briefing.

52. Following the Hearings, Defendants filed the Motion for Further Argument and/or Briefing which the Court, in its discretion, granted in part. (*See* ECF No. 136.) Each side was permitted to file one brief on limited issues concerning the 25 June 2018 Shareholders' Agreement, and the Unsigned December 2018 Shareholders' Agreement. (ECF No. 136.) Defendants also filed Defendants' Brief on Issue of Nominal/Actual Damages. (ECF No. 140.) Plaintiff followed suit by filing Plaintiff's Brief on the Court's Partial Summary Judgment Damages Question. (ECF No. 143.)

53. Defendants filed a separate Motion to Supplement Joint Appendix while the supplemental briefing was ongoing. (ECF No. 137.) Following full briefing on that motion, and the completion of supplemental briefing, the Court held a subsequent hearing on 14 February 2023 where all parties participated through their respective counsel. (*See* ECF No. 145.)

54. The Cross-Motions for Summary Judgment are ripe for resolution.

IV. LEGAL STANDARD

55. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83 (2000). "Substantial evidence is such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 8 (2018).

56. The moving party bears the burden of showing that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563 (2008). The movant may make the required showing by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson*, 352 N.C. at 83 (citations omitted).

57. "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000).

58. The Court must view the evidence in the light most favorable to the nonmovant. *Dobson*, 352 N.C. at 83. However, the nonmovant

> may not rest upon the mere allegations or denials of their pleading, but their response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If [the nonmovant] does not so respond, summary judgment, if appropriate, shall be entered against [the nonmovant].

N.C.G.S. § 1A-1, Rule 56(e).

59. "For affirmative summary judgment on a party's own claim, the burden is heightened." *Futures Grp. v. Brosnan*, 2023 NCBC LEXIS 7, at **4 (N.C. Super. Ct. Jan. 19, 2023). The movant "must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985); *accord Kidd v. Early*, 289 N.C. 343, 370 (1976). Consequently, "rarely is it proper to enter summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984).

V. ANALYSIS

60. The Court first addresses Counterclaims Five and Seven, as to which both sides request summary judgment. The Court then considers the remainder of Plaintiff's motion and concludes with the remainder of Defendants' motion.

A. Counterclaim Five: Violations of the UDTPA

61. Both sides request summary judgment on Defendants' Counterclaim Five for Mr. Loyd's alleged violations of the UDTPA for issuing false or inaccurate COIs to GIA's insurance clients. (Br. Supp. Defs.' Mot. 15, ECF No. 128 ["Defs.' Br. Supp."]; Pl.'s Br. Supp Mot. 18, ECF No. 115 ["Pl.'s Br. Supp."]; Countercls. ¶ 53.)

62. To establish a UDTPA claim, Defendants must prove "(1) an unfair or deceptive act or practice [by Plaintiff], (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 738 (2008) (citation omitted). Our Courts have

explained that "[t]he purpose of [the UDTPA] is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." *United Virginia Bank v. Air-Lift Assoc.*, 79 N.C. App. 315, 319–20 (1986) (citing *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 448 (1982)). "The determination as to whether an act is unfair or deceptive is a question of law for the court." *Dalton v. Camp*, 353 N.C. 647, 656 (2001).

63. This Court has held that a UDTPA claim must fail when "the alleged conduct occurred within the scope of an employer-employee relationship[.]" *Vollrath v. Corinthian Ophthalmic, Inc.*, 2014 NCBC LEXIS 61, at *14–15 (N.C. Super. Ct. Nov. 20, 2014) (citing *Buie*, 56 N.C. App. at 448). However,

> the mere existence of an employer-employee relationship does not in and of itself serve to exclude a party from pursuing an unfair trade or practice claim. For example, employers have successfully sought damages under the Act when an employee's conduct: (1) involved egregious activities outside the scope of his assigned employment duties, and (2) otherwise qualified as unfair or deceptive practices that were in or affecting commerce.

Dalton, 353 N.C. at 656. "[W]hile the statutory definition of commerce crosses expansive parameters, it is not intended to apply to all wrongs in a business setting." *Id.* at 657.

64. Defendants argue that Mr. Loyd's "practice of misrepresenting insurance policies on forms given to customers" was misleading, and that "commerce" should be understood broadly to include his actions because they affected GIA's day-to-day business. (Defs.' Br. Supp 16–17.) Plaintiff argues that this alleged violation of the

UDTPA concerns only the internal affairs of GIA because Mr. Loyd was an employee of GIA, and therefore the claim is barred by well-settled law. (*See* Pl.'s Br. Opp. Defs.' Mot. 18, ECF No. 117 ["Br. Opp. Defs.' Mot."].) Plaintiff further contends that the relationship between an insurance agency and its agent does not fall within the scope of the UDTPA. (Pl.'s Br. Supp. 18–19.) The primary issue before the Court, therefore, is whether Mr. Loyd's relationship to GIA and Mr. Griffin is in or affecting commerce and therefore covered by the UDTPA.

65. In *Buie v. Daniel Int'l Corp.*, our Court of Appeals held that "[u]nlike buyer-seller relationships, . . . employer-employee relationships do not fall within the intended scope of [§]75-1.1, [and instead, e]mployment practices fall within the purview of other statutes adopted for that express purpose." *Buie*, 56 N.C. App. at 448. Our Supreme Court has agreed with and relied upon that holding. *See Dalton*, 353 N.C. at 656; *Sara Lee Corp. v. Carter*, 351 N.C. 27, 31, 33 (1999); *Hajmm Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 593 (1991).

66. In *Sara Lee Corp v. Carter*, the relationship at issue was one of buyer-seller, though the seller was also an employee of the buyer. 351 N.C. at 33–34. There, defendant "engaged in self-dealing business activities wherein he sold computer parts and services to his employer from companies owned by him." *Id.* at 32–33. Our Supreme Court held that defendant's relationship to plaintiff as an employee did not preclude application of the UDTPA because the conduct at issue concerned their buyer-seller transactions, which fell squarely within the UDTPA's intended reach. *Id.*

67. Notwithstanding that holding, which arose under unusual circumstances not relevant to the current dispute, conduct related to disputes involving the LLC, its officers, and an employee-minority owner, are "[i]nternal disputes . . . not in or affecting commerce." *McFee v. Presley* 2022 NCBC LEXIS 142, at **10 (N.C. Super. Ct. Nov. 29, 2022); *see also White*, 364 N.C. at 48 (agreeing that regulating "purely internal business operations" was not the General Assembly's intent when it enacted the UDTPA).

68. Regardless of Mr. Loyd's relationship to either Defendant—be it Mr. Loyd's employment with GIA, or his shareholder and officer relationship with Mr. Griffin—neither may be a basis for Defendants' UDTPA claim. Internal business disputes are not in or affecting commerce for purposes of the UDTPA, and neither party contends that Mr. Loyd issued a false or inaccurate COI to GIA or Mr. Griffin such that a potential buyer-seller relationship was created. Since Counterclaim Five concerns Mr. Loyd's conduct and its impact on GIA, rather than its impact on commerce, the relationship alleged is not the kind our General Assembly intended to cover when enacting the UDTPA. *See White*, 364 N.C. at 48.

69. Therefore, the Court **GRANTS** Plaintiff's Motion for Partial Summary Judgment, and Counterclaim Five is hereby **DISMISSED** with prejudice. Defendants' Motion for Summary Judgement as to Counterclaim Five is therefore **DENIED**.

B. Counterclaim Seven: Breach of Contract Seeking Specific Performance of the 25 June 2018 Shareholders' Agreement

70. Both sides request summary judgment on Defendants' Counterclaim Seven. In Counterclaim Seven, Defendants allege that, if the 25 June 2018 Shareholders' Agreement is not rescinded, it should be specifically enforced.[14] (Countercls. ¶ 74.) Defendants allege that GIA is "entitled to specific performance and an order directing the Plaintiff to sell his shares in GIA pursuant to the terms of the [25 June 2018] Shareholders' Agreement." (Countercls. ¶ 74.)

71. As a preliminary matter, "[c]ourts may enter summary judgment in contract disputes because they have the power to interpret the terms of contracts." *McKinnon v. CV Indus.*, 213 N.C. App. 328, 333 (2011). "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). "The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." *Se. Caissons, LLC v. Choate Constr. Co.*, 247 N.C. App. 104, 110 (2016). "It is axiomatic that a valid contract between two parties can only exist when the parties assent to the same thing in the same sense[.]" *Normile v. Miller*, 313 N.C. 98, 103 (1985) (internal marks omitted).

72. If the terms to be interpreted "are plain and unambiguous, there is no room for construction [and t]he contract is to be interpreted as written." *Jones v. Casstevens*, 222 N.C. 411, 413 (1942). Plain, unambiguous terms should therefore be

[14] As stated herein, the counterclaim for rescission was voluntarily dismissed without prejudice and not refiled. (ECF No. 30.) The Court, therefore, does not address the allegations contained in that counterclaim.

"given their ordinary, accepted meaning unless it is apparent another meaning is intended." *Peirson v. Am. Hardware Mut. Ins. Co.*, 249 N.C. 580, 583 (1959).

73. The primary issue at this stage concerns Defendants' argument that the 25 June 2018 Shareholders' Agreement is "valid and enforceable" and that the specific terms Defendants seek to enforce "are clear and explicit." (Defs.' Br. Supp. 20–21.) Plaintiff contends that the 25 June 2018 Shareholders' Agreement was amended on 1 December 2018 when Mr. Patton was added, and that because of this amendment, the claim for specific performance—requiring Mr. Loyd to transfer his shares in GIA upon the termination of his employment—is barred by Section 12 of the 25 June 2018 Shareholders' Agreement. (Br. Opp. Defs.' Mot. 20–22.)

74. "Generally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract[.]" *Orthodontic Ctrs. of Am., Inc. v. Hanachi*, 151 N.C. App. 133, 135 (2002) (citation omitted). Defendants seek to enforce the 25 June 2018 Shareholders' Agreement, and therefore have the burden of establishing it was a valid contract following Mr. Patton becoming a shareholder in GIA. However, Plaintiff contends that the 25 June 2018 Shareholders' Agreement was amended, and that by the terms of the agreement, the amendment bars the claim alleged by Defendants. (*See* Br. Opp. Defs.' Mot. 21–22.) "The burden of proving modification . . . is on the party asserting it." *Lambe-Young v. Cook*, 70 N.C. App. 588, 591 (1984) (citations omitted). "Further, proof of an oral agreement that modifies a written contract should be by clear and convincing evidence." *Id.* (citations omitted).

75. The 25 June 2018 Shareholders' Agreement provides that "[a]ll provisions of this Agreement shall be effective until changed by the mutual consent of all the Shareholders, except as otherwise provided by law." (J.A. 356.) Notably, it does not require a writing signed by the parties, only their mutual consent. Defendants argue that all shareholders consented to Mr. Patton becoming a shareholder, and that this did not amend the 25 June 2018 Shareholders' Agreement. (Defs.' Br. Supp. 20–21.) Mr. Loyd asserts that he did not consent to Mr. Patton being added as a shareholder, but that nonetheless there was an amendment because Mr. Patton became a shareholder. (Br. Opp. Defs.' Mot. 22.) Therefore, Plaintiff contends that no forced sale of his shares may occur under the 25 June 2018 Shareholders' Agreement without his express consent. (Br. Opp. Defs.' Mot. 22.)

76. The record is in conflict regarding this claim. On the one hand, the documents of record indicate that Mr. Patton did receive shares in GIA and became a shareholder in it. (J.A. 1504.) Further, when Patton Insurance merged into GIA, that merger document provided that the "sole shareholder of Patton agrees to execute the Surviving Corporation's Shareholders' Agreement on the Effective Date of the Merger." (J.A. 567.) The Unsigned December 2018 Shareholders' Agreement looks like the 25 June 2018 Shareholders' Agreement on its face, and has three spaces for Mr. Patton, Mr. Loyd, and Mr. Griffin to sign. (J.A. 2973–78.) The parties dispute whether this document was ever executed, but the evidence suggests there was a modification to the 25 June 2018 Shareholders' Agreement. *See Anthony Tile & Marble Co. v. H.L. Coble Constr. Co.*, 16 N.C. App. 740, 741 (1972) ("Parties to a

contract may by mutual consent agree to change its terms and a written contract may ordinarily be modified by a subsequent parol agreement [which] may be either express or implied by conduct of the parties.").

77. There is also evidence in the record that Mr. Loyd was aware that Mr. Patton was becoming a shareholder, that they spoke in advance, and that Mr. Loyd did not object. Further, Mr. Loyd may have known that his share percentage would decrease upon the merger with Patton Insurance, and though there is evidence that he did not expressly consent in writing, the evidence tends to show that he failed to object in writing, or that his actions were consistent with disagreement with Mr. Patton becoming a shareholder of GIA. (*See* Loyd Dep. Apr. 2022, 400:16–420:8.)

78. Notwithstanding this evidence, there is also evidence of record that Mr. Loyd objected to Mr. Patton becoming a shareholder and never executed the Unsigned December 2018 Shareholders' Agreement. (Loyd Dep. Apr. 2022, 419:5–420:4 (stating that "Mr. Griffin had already decided this was going to happen, so I could like it or not like it" and that he "didn't have a choice"), 445:22–446:2 (stating that Mr. Loyd was not alleging the Patton Insurance merger took him by surprise, but rather that he "had no choice in the matter"), 460:5–12.) Further, neither side has been able to produce a signed copy of that document.

79. As a result, a genuine issue of material fact remains as to whether there was mutual consent of all parties to modify the 25 June 2018 Shareholders' Agreement, and if so, what terms were modified. Upon the current record, whether

mutual assent to an amendment to the 25 June 2018 Shareholders' Agreement existed and, if so, what the modifications to that agreement were, is an issue for the trier of fact. *Creech v. Melnik*, 347 N.C. 520, 527 (1998).

80. The Court may not properly determine by summary judgment whether Defendants are entitled to specific performance of the 25 June 2018 Shareholders' Agreement because reasonable minds may differ in deciding the validity and enforceability of it.

81. In summary, there are a host of contested material facts making summary disposition of this claim improper. Therefore, the Cross-Motions for Summary Judgment as to Counterclaim Seven are hereby **DENIED**.

C. <u>Counterclaim Three: Fraud</u>

82. Plaintiff requests summary judgment on Defendants' Counterclaim Three for fraud in the Merger Agreement, contending it must be dismissed because the representations relied upon were made by LIA, and because Defendants did not reasonably rely on the representations in the Merger Agreement given that they had custody and control over the COIs at issue. (Pl.'s Br. Supp. 15.)

83. Defendants allege that Plaintiff warranted that he and LIA "complied with and is not in default in any material respect under any laws, ordinances, requirements, regulations, or orders applicable to its business" and that this provision survived the merger of LIA into GIA. (Countercls. ¶ 36; J.A. 349.) Defendants allege that Mr. Loyd knew he was not in compliance with the insurance

laws applicable to the business due to his issuance of false or inaccurate COIs, and that this was intended to deceive Defendants. (Countercls. ¶¶ 37–38.)

84. In North Carolina, the "essential elements of actual fraud are well established: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Forbis v. Neal*, 361 N.C. 519, 526–27 (2007) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974)). "[R]eliance on the allegedly false representations must be reasonable." *Id.* at 527. "Reliance is not reasonable if a plaintiff fails to make any independent investigation, or fails to demonstrate he was prevented from doing so." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449 (2015) (internal marks and citations omitted). "Whether each of the elements of actual fraud and reasonable reliance are met are ordinarily questions for the jury 'unless the facts are so clear that they support only one conclusion.' " *Gould Killian CPA Grp., P.A.*, 371 N.C.at 9 (quoting *Forbis*, 361 N.C. at 527).

85. Defendants rely on *Tillery Envtl. LLC v. A&D Holdings, Inc.*, which the Court finds instructive. 2018 NCBC LEXIS 13 (N.C. Super. Ct. Feb. 9, 2018). *Tillery* was a case concerning agreements which facilitated a merger between two companies, and the alleged misrepresentations and omissions concerning workplace injuries prior to that merger. *Id.* at *3, *14–15. There, the Court decided, at the Rule 12(b)(6) stage, the issue of whether "a seller could be [held individually] liable for a sold company's contractual representations in certain situations." *Id.* at *44. Deciding an

issue of first impression, Chief Judge Bledsoe, who relied on two cases from the Delaware Chancery Court, wrote:

> [A] corporation has no mind with which to think, no will with which to determine and no voice with which to speak, and this means a corporation can only act through human agents. These agents . . . cannot escape personal liability for the corporation's fraudulent actions when they have actively participated in the fraud. In keeping with the holding of *ABRY Partners V, L.P.*, the court concluded that these principles meant the sellers could indeed be liable for fraudulent contractual representations made by the Company because the purchaser sufficiently alleged that the sellers knew that the representations in the stock purchase agreement were false. The purchaser also sufficiently alleged that the sellers actively participated in making the false representations[.]

Id. at *45 (cleaned up) (citing *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006); *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35 (Del. Ch. 2015)).

86. As the Court articulated in *Tillery*, an agent of the selling entity will not be insulated from accountability for its false or misleading statements, if any. Therefore, Mr. Loyd similarly cannot be insulated by the corporate form of LIA and may be individually responsible for any false representations he made or any concealment of material facts in the Merger Agreement.

87. However, Counterclaim Three fails on a different basis. The record evidence before the Court demonstrates that LIA did not produce any false or inaccurate COIs. Rather, the evidence demonstrates that all the COIs produced in the Joint Appendix name GIA as the producer. (J.A. 357–80 (five COIs produced, each listing "Griffin Insurance Agency" or "Griffin Insurance" as the producer, at the West Plaza Location), 1733–37 (COIs issued naming GIA as the producer, each

generated throughout 2018 for the same insured), 1746–58 (COIs listing GIA's West Plaza Location as the producer for insureds, some issued as early as January 2017), 2188–91 (COIs listing GIA's West Plaza Location, issued in September 2019).)

88. While Mr. Loyd may have directed GIA employees to issue false or misleading COIs, and may have issued those COIs himself, there is no record evidence that LIA was the producer of any of those policies. In fact, the NCDOI's investigation concluded that "Agent Loyd directed and advised agents at *Griffin Insurance* to issue certificates and include wording on the certificates that was not covered by the policies." (J.A. 1007–29 (emphasis added).)

89. Rather, the evidence before the Court is clear that GIA was the producer of each of the COIs included in the record, and therefore, Mr. Loyd's representations on behalf of LIA as to Sections 8 and 14 of the Merger Agreement were not false, nor did they conceal any material facts related to the merger or LIA's compliance with applicable insurance laws and regulations.

90. Therefore, Plaintiff's Motion for Partial Summary Judgment is **GRANTED** and Defendants' Counterclaim Three for fraud in the Merger Agreement is hereby **DISMISSED** with prejudice.

D. <u>The Breach of Contract Counterclaims</u>

91. Plaintiff requests summary judgment on Defendants' remaining breach of contract claims, alleged in Counterclaims Two and Six.

1. Counterclaim Two: Breach of the Merger Agreement

92. Defendants allege that Mr. Loyd and LIA made various representations and warranties in the Merger Agreement that "were false" because, at the time the parties to the Merger Agreement entered into it, both Mr. Loyd and LIA failed to stay in compliance with all applicable insurance laws and regulations. (Countercls. ¶¶ 29–30.) Defendants argue that this was intentional, in bad faith, and a breach of the material terms of the Merger Agreement. (Countercls. ¶¶ 31–32.)

93. The Court has determined herein that Mr. Loyd may be held individually liable for any false representation or concealment in the Merger Agreement made in his capacity as president of LIA, since he was serving as LIA's agent when entering into that agreement. (*See supra* Part V.C.) However, the Court need not address whether Mr. Loyd materially breached the Merger Agreement in that capacity because the evidence before the Court indisputably demonstrates that GIA was the producer of each of the COIs included in the record.

94. Section 8(g) of the Merger Agreement provides that LIA "complied with and is not in default in any material respect under any laws, ordinances, requirements, regulations, or orders applicable to *its business*." (J.A. 349 (emphasis added).) Therefore, Mr. Loyd's representations on behalf of LIA and its compliance with the applicable insurance laws were not false, nor did it result in a concealment of material facts, given that the record evidence demonstrates that LIA did not produce any false or inaccurate COIs.

95. Defendants cannot establish a breach of the Merger Agreement by Mr. Loyd because his representations therein were made on behalf of LIA and the evidence before the Court is clear that there were no false representations or warranties, as Defendants contend, because GIA was the producer on each false or misleading COI. Therefore, Plaintiff's Motion for Partial Summary Judgment is **GRANTED** and Counterclaim Two is hereby **DISMISSED** with prejudice.

2. Counterclaim Six: Breach of the Associate Agent Agreement

96. Plaintiff contends that Counterclaim Six for breach of the Associate Agent Agreement fails, arguing that Defendants have not offered evidence of damages resulting from the alleged breach. (Pl.'s Br. Supp. 19–20.)

97. "Under North Carolina law, proof of damages is not an element of a claim for breach of contract." *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2019 NCBC LEXIS 46, at *127 (N.C. Super. Ct. Aug. 8, 2019) (citation omitted). Rather, "in a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least." *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 172 (1999) (citation and quotation marks omitted). Thus, "judgment as a matter of law should not be entered against the claimant's entire cause of action on grounds that his or her evidence of damages is wanting." *Crescent Univ. City Venture, LLC*, 2019 NCBC LEXIS 46, at *127–28 (citing *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 271–72 (1968); *Hodges v. Young*, 2011 N.C. App. LEXIS 370, at *5–6 (2011)).

98. Plaintiff's sole argument in support of his motion is that Defendants have not come forth with evidence of damages related to this counterclaim. (Pl.'s Br. Supp. 19–20; Pl.'s Reply Br. 11–12, ECF No. 116 ["Pl.'s Reply"].) However, even if Defendants have failed to offer evidence of actual damages at this stage, as Plaintiff contends, Plaintiff is not *ipso facto* entitled to summary judgment in his favor if the evidence in the record tends to support the elements of that claim. Instead, as the movant, it is Plaintiff's burden of showing that no genuine issues of material fact remain to be resolved.

99. Plaintiff has failed to meet his burden of showing no genuine issue of material fact remains as to the elements of this breach of contract claim, and therefore, Plaintiff's Motion for Partial Summary Judgment as to Counterclaim Six is **DENIED**.[15]

E. <u>The Fiduciary Claims</u>

100. Defendants request summary judgment in their favor on Counterclaim One and Plaintiff's Count One, each alleging claims for breach of fiduciary duties, one by Mr. Loyd and one by Mr. Griffin, respectively. Defendants also request summary judgment on Plaintiff's Count Two, in which Plaintiff bases his constructive fraud claim on the same fiduciary relationship alleged in Count One. Defendants contend this claim fails because Plaintiff's breach of fiduciary duty claim fails.

[15] While not dispositive of the motion, the Court notes that Defendants have offered evidence of actual damages, proximately resulting from Mr. Loyd's alleged breach of the Associate Agent Agreement.

101. "To establish a breach of fiduciary duty, a plaintiff must show the existence of a fiduciary duty, a breach of that duty, and injury proximately caused by the breach." *Bennett v. Bennett*, 2020 NCBC LEXIS 147, at **16 (N.C. Super. Ct. Dec. 16, 2020) (citing *Green v. Freeman*, 367 N.C. 136, 141 (2013)). "Claims for breach of fiduciary duty and constructive fraud are often paired together, as they are here." *Potts v. KEL, LLC*, 2019 NCBC LEXIS 30, at *10 (N.C. Super. Ct. May 9, 2019). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294 (2004).

1. Plaintiff's Counts One and Two

102. In Count One, Plaintiff alleges that Mr. Griffin, as majority shareholder of GIA, owning as many as 1500 shares and as few as 490 shares, owed Mr. Loyd a fiduciary duty and obligation of good faith. (SAC ¶¶ 174–75.) Plaintiff alleges that Mr. Griffin "used his majority shareholder status and position of power and trust at GIA to control and dominate the affairs of GIA, at the expense of [Mr.]Loyd." (SAC ¶ 180.) Plaintiff specifically alleges fourteen (14) events which he contends constituted a breach of that duty, including: failure to obey three sections of the GIA Articles of Incorporation; failure to alert Mr. Loyd that Mr. Griffin owned only 490 shares after 1 December 2018, such that his unilateral actions were *ultra vires*; failure to obey four sections of the GIA Bylaws; unilaterally taking Mr. Loyd's shares in GIA and selling them without his consent; and, leveraging his majority shareholder status to coerce Mr. Loyd into executing various documents. (SAC ¶¶ 181, 183.)

103. In Count Two, Plaintiff alleges that Mr. Griffin used the fiduciary relationship to "seize opportunities to personally benefit himself in a pecuniary fashion, by improperly taking [P]laintiff's GIA stock, giving it to himself and others, and then selling [P]laintiff's GIA stock for a tremendous and unlawful profit, all at the expense of" Mr. Loyd. (SAC ¶ 191.) Further, Mr. Griffin's alleged breaches were for "his own wrongful and unfair pecuniary gain", constituted a constructive fraud, and proximately resulted in damages to Plaintiff. (SAC ¶¶ 192–93.)

104. Defendants argue that, prior to 25 June 2018, Mr. Griffin did not owe fiduciary duties to Mr. Loyd, contending that Mr. Loyd was only an "employee of GIA" and not a partner, because he was paid a W-2 salary, did not participate in profit sharing, and had no say in the parties' business dealings. (Defs.' Br. Supp. 23 (citing *Wilder v. Hobson*, 101 N.C. App. 199, 202 (1990)).) Even after 25 June 2018, Defendants argue that Plaintiff cannot prove proximate causation because Mr. Loyd's shareholder interest was reclaimed by GIA because he violated insurance laws, not because of any breach by Mr. Griffin. (Defs.' Br. Supp. 24–25.)

i. Prior to 25 June 2018

105. At the Rule 12(b)(6) stage, Mr. Loyd adequately alleged that he and Mr. Griffin "shared mutual fiduciary duties towards each other as partners throughout the entirety of the relevant transactions as a matter of law." *Loyd*, 2022 NCBC LEXIS 63, at **17–18. There, the allegations tended to show "that Griffin took advantage of his position of trust as Loyd's business partner to cause a merger between LIA and GIA, transfer shares of GIA stock to Loyd, and then ultimately

reclaim Loyd's stock to sell to Leavitt for a large profit to himself." *Id.* at **18–19. The parties dispute whether a partnership was formed, so the Court begins its analysis there.

106. Plaintiff argues that a partnership was formed in 2010 and ended at the time of the merger of LIA into GIA in 2018. (Br. Opp. Defs.' Mot. 2, 6.) Plaintiff contends that the RSPAs were a series of agreements between Mr. Griffin and Mr. Loyd to work together, to share GIA's profits, and to provide a mechanism to transfer ownership of GIA to Mr. Loyd when Mr. Griffin retired. (Br. Opp. Defs.' Mot. 6.)

107. "[T]he relationship of partners is fiduciary and imposes on them the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs." *Casey v. Grantham*, 239 N.C. 121, 124 (1954). A partnership is "an association of two or more persons to carry on as co-owners a business for profit." *Hines v. Arnold*, 103 N.C. App. 31, 35 (1991). As our Supreme Court has stated, "[a] contract, express or implied, is essential to the formation of a partnership" but a course of dealings between the parties of (1) sufficient significance and (2) sufficient duration may be evidence tending to establish a partnership, provided that the parties had the necessary intent. *Eggleston v. Eggleston*, 228 N.C. 668, 674 (1948) (citations omitted). An express agreement to form a partnership is not required, and "a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such." *Id.* Receipt of a share of the profits of a

business "is prima facie evidence that [person] is a partner in the business." *Hines*, 103 N.C. App. at 36.

108. Other significant evidence to consider is: (1) "the filing of a partnership tax return," *Davis v. Davis*, 58 N.C. App. 25, 31, *disc. rev. denied*, 307 N.C. 127 (1982); (2) an oral agreement to form a partnership; (3) statements of the parties in affidavits and depositions concerning whether there was a partnership; and (4) other documentary evidence in the record tending to indicate whether a partnership was formed, *Sturm v. Goss*, 90 N.C. App. 326, 331 (1988).

109. The only evidence presented by Plaintiff as to whether a partnership relationship existed are the three RSPAs. However, the evidence in the record indicates that the purpose of the RSPAs was for Mr. Loyd to purchase the rights to the revenue generated by GIA's sale of Nationwide insurance products, not to create a profit-sharing arrangement. Neither the RSPAs, nor the parties' conduct after executing them, indicate that the parties intended to form a partnership.

110. Further, the GIA Business Plan from August 2017 (the "2017 Business Plan") stated that Mr. Loyd was primarily responsible for the West Plaza Location, and that "[u]nder the *guidance and oversight of* [Mr.]Griffin," Mr. Loyd was responsible for the daily operation of that location. (J.A. 1685 (emphasis added).) The record demonstrates that GIA filed a tax return as an S Corporation, and that neither Mr. Griffin, Mr. Loyd, GIA, nor LIA ever filed a tax form for reporting partnership income. (*See* J.A. 1072, 1930–73 (demonstrating that in 2017 and 2018, Mr. Loyd did not file any forms related to a partnership).) Rather, the record

demonstrates that Mr. Loyd received his first Schedule K-1, a Form 1120S, from GIA for 2018, and that the form reported shareholder income, deductions, and credits. (J.A. 2586.) This evidence tends to indicate that Mr. Loyd and Mr. Griffin were *not* partners.

111. Mr. Loyd testified that he personally believed that he was a partner in GIA. (Loyd Dep. Oct. 2021, 44:12–17.) Mr. Loyd thought he was a partner in GIA because he "had worked there for eight years," but also stated that he did not have any ownership interest in GIA prior to the merger of LIA into GIA. (Loyd Dep. Oct. 2021, 45:18–20, 47:24–48:19.) At his second deposition, Mr. Loyd testified that he believed they "had a partnership from the beginning" but Mr. Loyd did not give an answer as to whether there were any partnership documents. (Loyd Dep. Apr. 2022, 401:2–402:14.)

112. Mr. Griffin made no statements in his deposition about Mr. Loyd being a partner of GIA at any time prior to when Mr. Loyd became a shareholder in 2018. (*See* Griffin Dep.) Rather, Mr. Griffin affirmed in his affidavit that he and Mr. Loyd were not partners, nor was Mr. Loyd a partner with GIA, stating "Mr. Loyd did not share in the profits or losses of GIA, nor did he have any decision-making authority with respect to GIA's corporate governance." (J.A. 1175–76.) Rather, the three RSPAs allowed Mr. Loyd to "finance the purchase of the Revenue Stream" from three GIA locations. (J.A. 1176.) The RSPAs functioned as an assignment from Mr. Griffin to Mr. Loyd of Mr. Griffin's rights to receive the revenue at those locations, *not* as an agreement to engage in a partnership with Mr. Loyd. (J.A. 1176.)

113. The Court concludes that there is insufficient evidence that Mr. Loyd and Mr. Griffin formed a partnership to create an issue for the jury. There is no record evidence of an express agreement between them, and Plaintiff has not come forward with sufficient evidence to suggest an implied-in-fact partnership because there is no evidence that Mr. Griffin had the necessary intent for them to carry on as co-owners. Therefore, Mr. Griffin did not owe fiduciary duties to Mr. Loyd by virtue of a partnership relationship.

114. Accordingly, Defendants' Motion for Summary Judgment is **GRANTED** in part as to the breach of fiduciary duty claim, to the extent it is based on an alleged partnership between Mr. Loyd and Mr. Griffin prior to Mr. Loyd becoming a shareholder of GIA, and to that extent, Plaintiff's Counts One and Two are hereby **DISMISSED** with prejudice.

ii. Following 25 June 2018

115. The record is clear that, following the execution of the 25 June 2018 Shareholders' Agreement, Mr. Loyd became a minority shareholder in GIA on 1 July 2018. (*See* J.A. 352–56.) It is well-settled in North Carolina that "the majority stockholder of a corporation owes fiduciary duties to the minority stockholders." *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 616 (2018).

116. Between 1 July 2018, when Mr. Loyd became a shareholder of GIA, and 1 December 2018, when Mr. Patton became a shareholder of GIA, Mr. Griffin was indisputably the majority shareholder, and Mr. Loyd a minority shareholder. (*See* J.A. 346.)

117. However, a genuine issue of material fact remains as to how many shares Mr. Griffin held in GIA after 1 December 2018, and therefore, the Court cannot conclude that Mr. Griffin owed Mr. Loyd fiduciary duties after the addition of Mr. Patton because the evidence is conflicting as to whether Mr. Griffin continued to be a majority shareholder after that time.

118. As stated herein, the record evidence before the Court is disputed on this issue. Mr. Griffin contends that, since the formation of GIA, he was at all times the majority shareholder until GIA was sold on 31 December 2020. (J.A. 1175.) Defendants argue that Mr. Griffin held 990 shares in GIA, citing to the GIA Share Records. (Defs.' Reply 6.) This is further evidenced by the Stock Sales Agreement for the Leavitt Group's purchase of GIA on 31 December 2020, which provides that Mr. Griffin, as trustee of the Griffin Trust, had 990 shares. (J.A. 978.)

119. Plaintiff argues that Mr. Griffin held no more than 490 shares after 1 December 2018, also citing to the GIA Share Records. (Br. Opp. Defs.' Mot. 24–25.) Plaintiff alleges in the alternative, in the same verified Second Amended Complaint, that Mr. Griffin held only 490 of GIA's 1000 outstanding shares, Mr. Loyd held 345 shares, and Mr. Patton held 165 shares, and that Mr. Griffin therefore did not have majority shareholder status. (SAC ¶¶ 13, 93.)

120. Further, Plaintiff's expert, Gregory Thomas Reagan, calculated the number of shares held by each individual on 1 December 2018, finding that Mr. Griffin held 490 shares, Mr. Loyd held 345 shares, and Mr. Patton held 165 shares. (J.A. 2952.)

For this opinion, Mr. Reagan cites to and relies on the same GIA Share Records that Defendants argue show that Mr. Griffin held 990 shares. (J.A. 2201.)

121. These rivaling contentions are further complicated by Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, where Plaintiff states that "GIA was a closely held corporation, and so Griffin, *the majority shareholder* and sole director, owed Mr. Loyd fiduciary duties[.]" (Br. Opp. Defs.' Mot. 23 (emphasis added).) Yet later in the same section of Plaintiff's brief concerning Counts One and Two, Plaintiff contends that Mr. Griffin lost that majority status at the time Mr. Patton became a shareholder, and that Mr. Griffin's unilateral conduct thereafter was *ultra vires*.[16] (Br. Opp. Defs.' Mot. 24.)

122. Majority shareholders, by virtue of their majority status, may hold control over the corporation and therefore owe a duty to protect the interests of minority shareholders, who "can act and contract in relation to the corporate property only through the former." *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344 (1951). Additionally, in certain circumstances, a minority shareholder exercising actual control over a corporation may owe fiduciary duties to the other shareholders. *See Corwin*, 371 N.C. at 616–17. "As a necessary prerequisite for a minority stockholder to exercise actual

[16] Mr. Loyd also contends that the vote taken at the 12 March 2020 special meeting of the directors and shareholders of GIA was improper. Mr. Loyd argues that the meeting, and the vote taken, were "bogus" because (1) all shareholders did not consent to the meeting, or to the adoption of any resolutions taken at the meeting, and (2) the minutes of the meeting falsely report that there was a GIA shareholder vote authorizing GIA's repurchase of Mr. Loyd's shares, though there was no such vote. (Br. Opp. Defs.' Mot. 13–14.) These acts by Mr. Griffin, Plaintiff argues, failed to comply with GIA's bylaws, were at odds with GIA's governing documents, and, therefore, were *ultra vires*. (Br. Opp. Defs.' Mot. 25–27.)

control, then, the stockholder's power must be so potent that independent directors . . . cannot freely exercise their judgment, fearing retribution." *Id.*

123. The number of shares Mr. Griffin held at the time Mr. Loyd was terminated, and upon the sale of GIA to Leavitt Group, and the effect such a determination may have on Mr. Griffin's fiduciary duties, if any, directly to Mr. Loyd, are disputed material facts necessary to the determination of these claims. Thus, summary judgment would be improper on both Counts One and Two.

124. Therefore, Defendants' Motion for Summary Judgment as to Counts One and Two of the Second Amended Complaint is **DENIED**, except as stated herein at Part V.E.1.i for the period prior to 25 June 2018.

2. Counterclaim One

125. Defendants contend that summary judgment is appropriate on their Counterclaim One because Mr. Loyd: (1) owed GIA a fiduciary duty as its corporate officer from 1 July 2018 through March 2020; (2) breached that duty when he directed employees to issue false COIs; and (3) thereby caused significant damage to GIA. (Defs.' Br. Supp. 13–15.)

126. The Court first notes that, because Defendants seek "offensive summary judgment on their own claim, they must show 'that there are no gaps in [their] proof, that no inferences inconsistent with [their] recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury.' " *Ford v. Jurgens*, 2021 NCBC LEXIS 10, at **3 (N.C. Super. Ct. Feb. 2, 2021) (quoting *Parks Chevrolet, Inc.*, 74 N.C. App. at 721).

127. "A corporate officer owes a fiduciary duty to the corporation." *Meiselman v. Meiselman*, 58 N.C. App. 758, 775 (1982); *Aecom Tech. Corp. v. Keating*, 2012 NCBC LEXIS 9, at **5 (N.C. Super. Ct. Feb. 6, 2012). An officer of a North Carolina corporation is required to perform his duties "(1) [i]n good faith; (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) [i]n a manner [they] reasonably believe[] to be in the best interests of the corporation." N.C.G.S. § 55-8-30(a). Importantly, "[this] standard of conduct is subject to review under the business judgment rule." *State v. Custard*, 2010 NCBC LEXIS 9, at *55 (N.C. Super. Ct. Mar. 19, 2010). The officer's duties "must be judged in the context in which they occur." *Lee v. McDowell*, 2022 NCBC LEXIS 51, at **23 (N.C. Super. Ct. May 26, 2022).

128. Further, "[e]vidence that a [director] was inattentive, uninformed, acted in bad faith, or made a decision that is unreasonable may be considered in determining that the business judgment rule does not apply to protect alleged misdeeds." *Emrich Enters. v. Hornwood, Inc.*, 2022 NCBC LEXIS 19, at *45–46 (N.C. Super. Ct. Feb. 15, 2022) (applying the business judgment rule to the actions of managers). "A reviewing court's focus must be on the process undertaken by the [corporate fiduciary], not the content of the decision made." *McDowell* 2022 NCBC LEXIS 15, at **27–28. While "questions of motive and a director's state of mind may arise [during this analysis], the existence of those issues does not automatically preclude summary judgment. Concomitantly, there may be instances in which a director's or officer's motive or state of mind is a question for the jury." *Custard*, 2010 NCBC LEXIS 9, at **53. "The

Court has a significant gatekeeper role in determining which factual circumstances warrant submission of bad faith issues to a jury." *Id.* "[I]f there is any question as to the weight of evidence summary judgment should be denied." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (citations omitted).

129. Plaintiff argues that Defendants have not shown that Mr. Loyd failed to "act in good faith and with due regard to [GIA's] best interests." (Br. Opp. Defs.' Mot. 15 (quoting *Consol. Planning, Inc.*, 166 N.C. App. at 293).) Rather, Mr. Loyd contends that he honestly believed his decisions were in the best interest of GIA, and that he issued false or inaccurate COIs because it was agency policy to make accommodations of this type to insurance clients. (Br. Opp. Defs.' Mot. 15–16.)

130. Mr. Loyd became GIA's vice president following the merger of LIA into GIA, and the evidence indicates that he served in that capacity until his termination. (J.A. 965–66.) Therefore, Mr. Loyd owed fiduciary duties to GIA as an officer of the company. It is undisputed on this record that Mr. Loyd issued false or inaccurate COIs and directed GIA employees to do the same. The primary issue, therefore, is whether it was a breach of the fiduciary duties he owed GIA as its officer, and whether any such breaches proximately caused the damage alleged by Defendants.

131. Plaintiff contends that he believed he was acting in GIA's best interest because he did not realize that issuing the COIs was unlawful until the NCDOI and Nationwide investigations. (Br. Opp. Defs.' Mot. 16.) In support of his argument, Plaintiff cites to the Armstrong Lawn COI, (J.A. 371, 1159–63), contending that it is an example of his acting in good faith.

132. Armstrong Lawn was a "one-person firm" whose lawncare client "refused to pay unless Armstrong could produce proof of workers' compensation coverage." (Br. Opp. Defs.' Mot. 16–17.) Mr. Loyd issued Armstrong Lawn a "ghost policy," which is a "minimum premium proof of workers' compensation coverage that does not actually cover anyone." (Br. Opp. Defs.' Mot. 17.) While Armstrong Lawn did have a commercial insurance policy with GIA, the company would not receive payment for work done unless it produced a ghost policy. (Br. Opp. Defs.' Mot. 17.) Plaintiff contends that he has a similar explanation for every false COI he issued, and, therefore, that he honestly believed his decisions were in the best interest of GIA. (Br. Opp. Defs.' Mot. 18.)

133. Defendants argue that issuing false or inaccurate COIs is a breach of the standard of care for insurance agents. (Defs.' Reply 14.) While this may be true, the inquiry is whether it was a breach of the duties Mr. Loyd owed to GIA as its officer, *not* as an insurance agent for it.

134. Since Defendants seek affirmative summary judgment, and they have failed to show that there are no gaps in their proof given that there remains an issue as to whether Mr. Loyd breached a fiduciary duty owed to GIA as its officer if his actions were taken in good faith, and that there remains a question as to the weight of this evidence, summary judgment would be improper. Accordingly, Defendants' Motion for Summary Judgment as to Counterclaim One is **DENIED**.

F. Count Three: Conversion

135. Defendants request summary judgment on Plaintiff's Count Three for conversion, which alleges that Defendants "took, and then transferred" Mr. Loyd's GIA shares without authorization, and that those shares "were [his] duly owned personal property." (SAC ¶ 195.) Further, Mr. Loyd alleges that Defendants wrongly exercised rights of ownership over those shares, and that those actions worked to the exclusion of his ownership rights in them. (SAC ¶¶ 196–97.)

136. "The tort of conversion is well defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *Peed v. Burleson's Inc.*, 244 N.C. 437, 439 (1956) (citation omitted). "There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012). In cases where defendant comes into possession of plaintiff's property lawfully, plaintiff must show that it made a demand for the return of the property that was refused by the defendant. *Hoch v. Young*, 63 N.C. App. 480, 483 (1983) (citations omitted).

137. Defendants' only argument here is that the "existence and enforceability of the [25 June 2018] Shareholders' Agreement is fatal to Plaintiff's claim" because it compels him to return his GIA shares to the company. (Defs.' Br. Supp. 26.) However, a genuine issue of material fact remains as to whether there was mutual consent of all parties to modify the 25 June 2018 Shareholders' Agreement, if any such

modification created a valid and enforceable agreement, and if so, what the terms of that modification were, including whether an enforceable agreement existed between the parties that required Mr. Loyd to transfer his shares in GIA to the company if he was terminated as an employee. Therefore, Defendants' Motion for Summary Judgment as to Count Three is **DENIED**.

G. Count Four: Unjust Enrichment

138. Defendants request summary judgment on Plaintiff's Count Four. Plaintiff alleges that he may recover in equity if there is no alternative remedy at law for the injury he allegedly suffered when Defendants took and transferred his shares in GIA without his consent. (SAC ¶¶ 200–01.)

139. "In North Carolina, to recover on a claim of unjust enrichment, Plaintiff must prove: (1) that it conferred a benefit on another party; (2) that the other party consciously accepted the benefit; and (3) that the benefit was not conferred gratuitously or by an interference in the affairs of the other party." *Cty. of Wake PDF Elec. & Supply Co., LLC v. Jacobsen*, 2020 NCBC LEXIS 103, at *29 (N.C. Super. Ct. Sept. 9, 2020) (citing *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002)).

140. Here, Plaintiff's unjust enrichment claim rests on the same evidence as the claim for conversion. Where a claim for unjust enrichment rests on the same evidence as a claim for conversion, and that claim for conversion survives the motion for summary judgment because an issue of material fact remains, the motion for summary judgment with respect to the claim for unjust enrichment must also be denied. *See Lau v. Constable*, 2019 NCBC LEXIS 71, at *32 (N.C. Super. Ct. Sept.

24, 2019) ("[B]ecause the Court has determined that there is a genuine dispute as to the facts forming the basis for [the] claim for conversion, Plaintiffs' motion for summary judgment on [the] claim for unjust enrichment must also be DENIED").

141. Given that the claim for conversion remains, Defendants' Motion for Summary Judgment as to Count Four is **DENIED**.

VI. CONCLUSION

142. For the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Cross-Motions for Summary Judgment as follows:

a. As to Plaintiff's Count One for breach of fiduciary duty against Mr. Griffin, Defendants' Motion for Summary Judgment is **GRANTED** in part and that claim is **DISMISSED** with prejudice to the extent it is based on a partnership relationship, and except as expressly granted herein, the motion is otherwise **DENIED**;

b. As to Plaintiff's Count Two for constructive fraud, Defendants' Motion for Summary Judgment is **GRANTED** in part and that claim is **DISMISSED** with prejudice to the extent it is based on a partnership relationship, and except as expressly granted herein, the motion is otherwise **DENIED**;

c. As to Plaintiff's Count Three for conversion, Defendants' Motion for Summary Judgment is **DENIED**;

d. As to Plaintiff's Count Four for unjust enrichment, Defendants' Motion for Summary Judgment is **DENIED**;

e. As to Defendants' Counterclaim One for breach of fiduciary duty, Defendants' Motion for Summary Judgment is **DENIED**;

f. As to Defendants' Counterclaim Two for breach of the Merger Agreement, Plaintiff's Motion for Partial Summary Judgment is **GRANTED**, and that claim is here by **DISMISSED** with prejudice;

g. As to Defendant's Counterclaim Three for fraud in the Merger Agreement, Plaintiff's Motion for Partial Summary Judgment is **GRANTED**, and that claim is hereby **DISMISSED** with prejudice;

h. As to Defendants' Counterclaim Five for violation of the UDTPA, Plaintiff's Motion for Partial Summary Judgment is **GRANTED**, and that claim is hereby **DISMISSED** with prejudice. Defendants' Motion for Summary Judgment is therefore **DENIED**;

i. As to Defendants' Counterclaim Six for breach of the Associate Agent Agreement, Plaintiff's Motion for Partial Summary Judgment is **DENIED**; and

j. As to Defendants' Counterclaim Seven for breach of contract seeking specific performance of the Shareholders' Agreement, the Cross-Motions for Summary Judgment are **DENIED**.

IT IS SO ORDERED, this the 27th day of March, 2023.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases