

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
23 CVS 5594

HUSQVARNA PROFESSIONAL  
PRODUCTS, INC. and  
HUSQVARNA BUSINESS  
SUPPORT AB,

Plaintiffs,

v.

ROBIN AUTOPILOT HOLDINGS,  
LLC; ROBIN TECHNOLOGIES,  
INC.; ROBOTIC MOWING  
INVESTMENTS, LLC; RLAM  
AZALEA, LLC; JEFFREY R.  
DUDAN IRREVOCABLE TRUST;  
JEFFREY DUDAN; and ANTHONY  
HOPP,

Defendants.

**ORDER AND OPINION ON  
PLAINTIFFS' MOTION FOR LEAVE  
TO AMEND COMPLAINT**

1. **THIS MATTER** is before the Court on Plaintiffs Husqvarna Professional Products, Inc. and Husqvarna Business Support AB's (together, "Plaintiffs") Motion for Leave to Amend Complaint (the "Motion") in the above-captioned case.<sup>1</sup>

2. Having considered the Motion, the parties' briefs, affidavits, and materials offered in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other relevant matters of record, the Court hereby **GRANTS in part** and **DENIES in part** the Motion.

*Nelson Mullins Riley & Scarborough, LLP, by Corey E. Manning, Thomas G. Hooper, Adam J. Hegler, and James K. Lehman, for Plaintiffs/Counterclaim Defendants Husqvarna Professional Products, Inc. and Husqvarna Business Support AB.*

*Jackson Walker LLP, by Blake T. Dietrich and Hailey Oestreich, and Lincoln Derr PLLC, by Tricia M. Derr and R. Jeremy Sugg, for*

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<sup>1</sup> (ECF No. 99.)

*Defendants/Counterclaim Plaintiffs Robin Autopilot Holdings, LLC, Robin Technologies, Inc., Robotic Mowing Investments, LLC, RLAM Azalea, LLC, Jeffrey R. Dudan Irrevocable Trust, Jeffrey Dudan, and Anthony Hopp.*

Bledsoe, Chief Judge.

I.

BACKGROUND

3. A summary of the allegations in Plaintiffs' Complaint<sup>2</sup> is set forth in the Court's Order and Opinion on Defendants' Motion to Dismiss Claims Against the Member Defendants and Robin Technologies, Inc., filed 22 September 2023.<sup>3</sup>

4. Plaintiff seeks leave to file its First Amended Complaint<sup>4</sup> pursuant to Rule 15 of the North Carolina Rules of Civil Procedure (the "Rule(s)") to supplement the factual allegations contained in the Complaint, add Defendant Robin Autopilot Holdings, LLC's ("Robin") former CEO, Logan Fahey ("Fahey"), as a party defendant, assert additional claims, and reassert various existing claims (the "Proposed Amended Complaint").<sup>5</sup>

5. Defendants oppose the Motion to the extent Plaintiffs seek to reassert claims for anticipatory breach of contract against Robin and Robin Technologies, Inc.

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<sup>2</sup> (ECF No. 4.)

<sup>3</sup> (ECF No. 77; *Husqvarna Prof. Prods., Inc. v. Robin Autopilot Holdings, LLC*, 2023 NCBC LEXIS 120 (N.C. Super. Ct. Sept. 22, 2023).)

<sup>4</sup> (Pls.' Mot. Leave Amend Compl. Ex. A, First Am. Compl. [hereinafter "Proposed Am. Compl.], ECF No. 88.2.)

<sup>5</sup> (Pls.' Mem. Law Supp. Mot. Leave Amend 2, ECF No. 88.1.)

(Claims One, Six, Seven, and Eight)<sup>6</sup> and assert new claims against Fahey for tortious interference with contract (Claims Eleven and Twelve)<sup>7</sup> and breach of fiduciary duty (Claim Thirteen).<sup>8</sup> Defendants contend that these claims are futile because the claim for breach of fiduciary duty cannot survive a motion to dismiss under Rule 12(b)(1) and the claims for tortious interference with contract and anticipatory repudiation cannot survive a motion to dismiss under Rule 12(b)(6).<sup>9</sup>

6. After full briefing, the Court convened a hearing on the Motion on 13 December 2023 (the “Hearing”), at which all parties were represented by counsel. The Motion is now ripe for resolution.

## II.

### LEGAL STANDARD

7. Rule 15 governs amendments to pleadings and provides in relevant part:

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 been placed

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<sup>6</sup> (Proposed Am. Compl. ¶¶ 124–30, 162–83.)

<sup>7</sup> (Proposed Am. Compl. ¶¶ 191–239.)

<sup>8</sup> (*See* Proposed Am. Compl. ¶¶ 240–54; Defs.’ Resp. Opp’n Pls.’ Mot. Leave Am. Compl. 2 [hereinafter, “Defs.’ Br. Opp’n”], ECF No. 98.) Defendants initially opposed the Motion to the extent Plaintiffs seek to reassert a claim for declaratory judgment against the Member Defendants (i.e., Robotic Mowing Investments, LLC, RLAM Azalea, LLC, Jeffrey R. Dudan Irrevocable Trust, Jeffrey Dudan, and Anthony Hopp) concerning the Note Purchase Agreement and the Supply Agreement that are at issue in this litigation. (Defs.’ Br. Opp’n 27–28). The parties agree, and the proposed Amended Complaint makes plain, however, that Plaintiffs do not seek to assert this claim against the Member Defendants. Accordingly, Defendants conceded that their opposition to the Motion on this ground is without merit and withdrew this contention at the hearing on the Motion. (*See* Proposed Am. Compl. ¶¶ 159–61.)

<sup>9</sup> Defendants do not challenge Plaintiffs’ assertion of Claims Two, Three, Four, Five, Nine, and Ten in the Proposed Amended Complaint. (*See* Defs.’ Opp’n Br.)

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). The rule “encourages trial courts to permit amendment liberally and evinces our State’s ‘general policy of allowing an action to proceed to a determination on the merits.’” *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, 2019 NCBC LEXIS 105, at \*4 (N.C. Super. Ct. Dec. 10, 2019) (quoting *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282 (1991)).

8. “Valid grounds for which a motion to amend may be denied include undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment.” *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 89 (2008) (cleaned up). “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 [c]ourt liberal discretion to find that an amendment lacks futility. Nevertheless, the court may deny a motion to amend where the allegations would not be sufficient to survive a motion to dismiss.” *Simply the Best Movers, LLC v. Marrins’ Moving Sys., Ltd.*, 2016 NCBC LEXIS 28, at \*\*5–6 (N.C. Super. Ct. Apr. 6, 2016) (internal citation omitted).

9. Applying these standards, therefore, a motion to amend is not futile when “the allegations of the [amended pleading], treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Harris v. NCNB Nat’l Bank*, 85 N.C. App. 669, 670 (1987). “[D]ismissal 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. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)).

10. “In the end, a ‘motion for leave to amend is addressed to the sound discretion of the trial judge[.]’” *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at \*16 (N.C. Super. Ct. Nov. 29, 2023) (quoting *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 430 (1990)).

11. “Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction,” *In re Z.G.J.*, 378 N.C. 500, 504 (2021), and “[s]tanding arguments can be presented under both Rule 12(b)(1) and 12(b)(6),” *Barefoot v. Barefoot*, 2022 NCBC LEXIS 8, at \*3 (N.C. Super. Ct. Feb. 2, 2022). “Rule 12(b)(1) requires the dismissal of any action ‘based upon a trial court’s lack of jurisdiction over the subject matter of the claim.’” *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394 (2018) (quoting Rule 12(b)(1)).

### III.

#### ANALYSIS

##### A. Breach of Fiduciary Duty

12. Plaintiffs seek to assert a derivative claim against Fahey for breach of the fiduciary duty he owed Robin as its CEO.<sup>10</sup> Defendants contend that this claim is

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<sup>10</sup> (Proposed Am. Compl. ¶¶ 240–54.)

futile because Plaintiffs failed to make pre-suit demand on Robin, as required under Ohio law, and therefore lack standing to assert this claim derivatively.<sup>11</sup> Plaintiffs admit that they failed to make pre-suit demand but contend that derivative demand was excused as futile under Ohio law.<sup>12</sup> The Court agrees with Defendants.

13. Robin is an Ohio limited liability company (“LLC”), and Plaintiffs seek to assert a breach of fiduciary duty claim against Fahey on behalf of Robin.<sup>13</sup> N.C.G.S. § 57D-8-06 provides that “[i]n any derivative proceeding in the right of a foreign LLC [such as the case here], the matters covered by [Chapter 57D] will be governed by the law of the jurisdiction of the foreign LLC’s organization except for the matters governed by G.S. 57D-8-02 [Stay of Proceedings], 57D-8-04 [Discontinuance or Settlement], and 57D-8-05 [Payment of Expenses].” As a result, Plaintiffs’ standing to bring a derivative claim on behalf of Robin is governed by the Ohio Revised Limited Liability Company Act (the “Ohio Act”). Ohio Rev. Code Ann. §§ 1706.01–.84.

14. The Ohio Act repealed and replaced Ohio’s former LLC Act (the “Former Ohio Act”) in early 2022. The Former Ohio Act permitted a member to commence a derivative action on behalf of an LLC if a demand on the LLC is refused, or, “if an effort to cause those managers to commence the action is not likely to succeed.” *See* Ohio Rev. Code § 1705.49 (repealed Jan. 2022). It is undisputed that no similar

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<sup>11</sup> (Defs.’ Br. Opp’n 11–13.) Plaintiffs admit in the Proposed Amended Complaint that Plaintiffs did not make written demand upon Robin. (*See* Proposed Am. Compl. ¶¶ 245–54.)

<sup>12</sup> (Pls.’ Reply Further Supp. Mot. Leave Amend Compl. 9–10 [hereinafter, “Pls.’ Reply Br.”], ECF No. 102.)

<sup>13</sup> (Proposed Am. Compl. ¶ 254.)

provision or other futility exception to the Former Ohio Act's demand requirement appears in the new statute. *See generally* Ohio Rev. Code §§ 1706.01–.84.

15. To the contrary, the Ohio Act provides, without exception, that a member of an LLC “may not commence a derivative action in the right of the limited liability company, or a series thereof, until both of the following occur”:

(A) A written demand has been made upon the limited liability company or the series to take suitable action.

(B) Ninety days have expired from the date the demand was made unless either of the following applies (i) The member has earlier been notified that the demand has been rejected by the limited liability company or the series; (ii) Irreparable injury to the limited liability company or the series would result by waiting for the expiration of the ninety-day period.

Ohio Rev. Code. Ann. § 1706.612 (LexisNexis 2021).

16. Plaintiffs argue that the Court should nonetheless read a demand futility exception into the Ohio Act, contending first that if the Ohio legislature intended to eliminate the exception, it would have stated so expressly, and second that the Ohio legislature did not intend to eliminate the futility exception from the new Ohio LLC Act because Ohio Rule of Civil Procedure 23.1 contains a procedure for corporate shareholders to allege demand futility, (*see* Ohio Civ. R. 23.1). The Court finds neither argument persuasive.

17. “In construing a statute [under Ohio law], a court’s paramount concern is the legislative intent in enacting the statute. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. The literal language of the pertinent statutes must be enforced whenever possible.”

*State ex rel. Auglaize Mercer Cmty. Action Comm'n., Inc. v. Ohio C.R. Comm'n.*, 654 N.E.2d 1250, 1253 (Ohio 1995). “To construe a statute, [the court] first looks at its express wording. [The court] must give effect to the words of a statute and may not modify an unambiguous statute by deleting words used or inserting words not used.” *State v. Teamer*, 696 N.E.2d 1049, 1051 (Ohio 1998) (cleaned up); *see also Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 865 N.E.2d 1275, 1278 (Ohio 2007) (“A court is neither to insert words that were not used by the legislature nor to delete words that were used.”). Indeed, the Ohio legislature “must be presumed to know the meaning of words, to have used words of a statute advisedly and to have expressed legislative intent by the use of the words found in the statute.” *Diller v. Diller*, 182 N.E.3d 370, 387 (Ohio Ct. App. 2021).

18. The derivative demand requirements in section 1706.612 of the Ohio Act are clear and unambiguous and do not contain any exceptions to written demand, including on grounds of futility. As shown above, the Ohio rules of statutory construction do not permit the Court to read an exception into the Ohio Act that the Ohio legislature did not include. Similarly, the fact that Ohio law permits a corporate shareholder to assert demand futility in bringing a derivative action under the Ohio Rules of Civil Procedure in no way suggests that the Ohio legislature intended to include such an exception for a member of an LLC.

19. As a result, the Court concludes that Plaintiffs are without standing to assert their proposed breach of fiduciary duty claim against Fahey due to Plaintiffs’



pleaded failure to make written demand on Robin. Accordingly, the Court will deny Plaintiffs' Motion to the extent it seeks to assert this derivative claim.<sup>14</sup>

B. Tortious Interference with Contract

20. Plaintiffs seek to assert two claims for tortious interference with contract against Fahey, alleging that Fahey caused Robin to breach its obligations to the Plaintiffs under a Supply Agreement (Claim Eleven) and under a Note Purchase Agreement (Claim Twelve) (together, the "Agreements") for his personal gain.<sup>15</sup>

21. Defendants contend that Plaintiffs' proposed claims against Fahey for tortious interference with contract are futile because (i) Fahey did not have the authority under Robin's operating agreement (the "Operating Agreement")<sup>16</sup> to cause

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<sup>14</sup> The Court notes that it would reach the same result applying North Carolina's rules of statutory construction, which are nearly identical to those of Ohio. *See, e.g., State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260 (1969) (noting that when a statutory section "is clear and understandable on its face, it requires no construction. In such a case, the Court is without power to interpolate or superimpose conditions and limitations which the [statute] does not of itself[]") (internal citation omitted); *Home Builders Ass'n of Fayetteville N.C., Inc. v. City of Fayetteville*, 170 N.C. App. 625, 627 (2005) ("[C]ourts should not infer additional language when it would have been a simple matter for the General Assembly to have included that explicit phrase.") (cleaned up); *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 410–11 (2000) ("Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.") (quoting *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 565 (1965)); *see generally Allen ex rel. Allen & Brock Constr. Co. v. Ferrera*, 141 N.C. App. 284, 288 (2000) (recognizing that North Carolina's similar derivative demand statute "abolished the futility exception under North Carolina law[]").

<sup>15</sup> (Proposed Am. Compl. ¶¶ 191–239.) In contrast to the North Carolina law governing Plaintiffs' proposed breach of fiduciary duty claim, North Carolina "favors the use of the *lex loci* test in cases involving tort or tort-like claims." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 420 (2020).

<sup>16</sup> (*See* Pls.' Opp'n Defs.' Mot. Dismiss Claims Against the Member Def. and Robin Technologies Ex. C, ECF No. 17.3 (sealed), ECF No. 41.2 (redacted).)

Robin to breach the Agreements without action of Robin’s Board of Managers (the “Board”), (ii) Plaintiffs’ allegations are insufficient to establish legal malice, and (iii) Plaintiffs’ allegations admit a motive other than malice.<sup>17</sup> Defendants also contend that allowing these claims to proceed against Fahey would be contrary to North Carolina public policy because it would inhibit corporate officers in the performance of their duties.<sup>18</sup>

22. Plaintiffs argue in response that the allegations of the Proposed Amended Complaint, taken as true, establish each element of a claim for tortious interference with contract.<sup>19</sup> Plaintiffs also argue that the North Carolina courts have rejected Defendants’ public policy arguments and have determined that corporate directors who act for their own benefit may be held personally liable for tortious interference.<sup>20</sup>

23. “To state a claim for tortious interference with contract, the [pleading] must allege: (1) a valid contract existed between the [claimant] and a third person conferring contractual rights to [claimant] against a third person; (2) [the opposing party] knows of the contract; (3) [the opposing party] intentionally induced the third person not to perform the contract; (4) in not performing the contract the third person acted without justification; and (5) [claimant] suffered actual damages.” *Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 467 (2022). Where, as here,

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<sup>17</sup> (Defs.’ Br. Opp’n 19–27.)

<sup>18</sup> (Defs.’ Br. Opp’n 26–27.)

<sup>19</sup> (Pls.’ Reply Br. 4–7.)

<sup>20</sup> (Pls.’ Reply Br. 9.)

the defendant is a company's officer, director, or other fiduciary, there is a presumption that the defendant acted with justification. *Id.* at 468. This presumption is overcome when a claimant alleges facts showing that the defendant acted with malice. *Id.* "In order to survive dismissal, a complaint alleging tortious interference must admit of no motive for interference other than malice." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 284 (2019) (citation omitted).

24. Defendants first contend that Plaintiffs' allegations are insufficient because Fahey, as Robin's CEO, did not have authority under the Operating Agreement to prevent Robin from fulfilling its contractual obligations. This argument is without merit. Although Defendants argue that Plaintiffs have failed to plead that Fahey needed and obtained the Board's approval to cause Robin not to pay the money due under the Agreements,<sup>21</sup> Plaintiffs have alleged that "the other managers on the Board of Managers [ ] passively permitted Mr. Fahey to direct Robin Autopilot . . . to undertake activity antagonistic and detrimental to the business purposes and best interest of Robin Autopilot."<sup>22</sup> Plaintiffs further allege that Fahey "directed and/or controlled Robin Autopilot's decision to not repay the [amounts due under the Agreements]."<sup>23</sup> These allegations, taken as true, permit a factfinder to conclude that Fahey induced Robin to breach the Agreements. As such, Defendants' first argument in opposition to the Motion is without merit.

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<sup>21</sup> (Defs.' Br. Opp'n 22.)

<sup>22</sup> (See Proposed Am. Compl. ¶ 250.)

<sup>23</sup> (Proposed Am. Compl. ¶¶ 196, 208.)

25. Defendants next contend that Plaintiffs' allegations of malice are insufficient to withstand Rule 12(b)(6) scrutiny because they are made "upon information and belief" and thus rest upon unwarranted deductions and unreasonable inferences.<sup>24</sup> Defendants' second contention, like their first, lacks merit. Our courts have rejected the notion that allegations made "upon information and belief" are insufficient to state a claim when challenged under Rule 12(b)(6). *See, e.g., Wilkie v. Stanley*, 2011 NCBC LEXIS 11, at \*\*15–16 (N.C. Super. Ct. Apr. 20, 2011) (rejecting contention that "allegations made on information and belief cannot support a claim attacked by a Rule 12(b)(6) motion made in advance of discovery.")<sup>25</sup>

26. Plaintiffs' allegations of malice are sufficient to survive Rule 12(b)(6) scrutiny here. Plaintiffs allege that Fahey "acted for his own personal benefit" in directing Robin not to pay Plaintiffs' invoices and "not for the legitimate business purposes or benefit of Robin Autopilot," and further that Fahey did so to "secure recoupment of his own personal investments in Robin" with priority over Robin's obligations to Plaintiffs.<sup>26</sup> Since these allegations would permit a factfinder to conclude that Fahey acted entirely in his personal interest and not in Robin's interest,

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<sup>24</sup> (Defs.' Br. Opp'n 23–24.)

<sup>25</sup> In contrast, our courts have made clear that "statements made 'upon information and belief'—or comparable language—do not comply with the 'personal knowledge' requirement [on summary judgment]," *Asheville Sports Props., LLC v. City of Asheville*, 199 N.C. App. 341, 345 (2009) (cleaned up), and further that "allegations based 'upon information and belief' are generally insufficient to meet the requirements of Rule 9(b)" for pleading fraud, *Perkins v. HealthMarkets, Inc.*, 2007 NCBC LEXIS 25, at \*13 (N.C. Super. Ct. July 30, 2007).

<sup>26</sup> (Proposed Am. Compl. ¶¶ 209–14, 232–37.)

the Court concludes that Plaintiffs' allegations of legal malice are sufficient to state a claim under Rule 12(b)(6). *See, e.g., Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 499 (1992) (“[A] plaintiff states the [malice] element of the claim of tortious interference with contract when he alleges facts supporting the allegation that the individual defendants’ actions were in their personal interest[.]”).

27. Defendants also contend that Plaintiffs’ allegations admit a motive other than malice, identifying three potential business reasons Fahey might have had for directing Robin not to pay Plaintiffs’ invoices under the Agreements.<sup>27</sup> But because Plaintiffs need not “negate in its pleadings facts that more properly support a defense[.]” *id.* at 499, Defendants’ argument fails under Rule 12(b)(6). *See id.* at 499–500 (noting that plaintiff need not plead defendants acted “without justification” for a tortious interference claim to survive Rule 12(b)(6) dismissal).

28. Finally, the Court finds Defendants’ public policy concerns are unwarranted. Officers, directors, shareholders, and other corporate fiduciaries have “a qualified privilege to interfere with contractual relations between the corporation and a third party.” *Id.* at 498 (citation omitted). “The acts of a corporate officer in inducing his company to sever contractual relations with a third party are presumed to have been done in the interest of the corporation.” *Id.* (citation omitted). But where a plaintiff has alleged “facts supporting the allegation that the individual defendants’ actions were in their personal interest,” the matter of the defendant’s good faith is an issue of fact to be presented as an affirmative defense. *Id.* at 499. As such, North

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<sup>27</sup> (Defs.’ Br. Opp’n 25–26.)

Carolina law permits Plaintiffs to seek to hold a corporate officer like Fahey accountable for tortiously interfering with his company's contracts for his own personal benefit.

29. For each of these reasons, therefore, the Court concludes that Plaintiffs' tortious interference claims are not futile, and Defendants' objections to Plaintiffs' Motion on this ground are without merit.

C. Anticipatory Repudiation

30. Finally, Plaintiffs seek to reassert four claims for anticipatory breach of contract that are premised primarily on a memorandum sent by Fahey to Plaintiffs on 6 March 2023 (the "March 6 Memo").<sup>28</sup> Defendants contend that these claims are futile because the Court concluded in its Order and Opinion on Plaintiffs' Motion to Dismiss Amended Counterclaims (the "November Order")<sup>29</sup> that the March 6 Memo is not a "distinct, unequivocal, and absolute refusal to perform."<sup>30</sup> *See Profile Invs. No. 25, LLC v. Ammons E. Corp.*, 207 N.C. App. 232, 237 (2010) ("For repudiation to result in a breach of contract, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute[.]") (cleaned up).<sup>31</sup>

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<sup>28</sup> (Proposed Am. Compl. ¶¶ 124–30, 162–83.) Plaintiffs' proposed claims for anticipatory breach of contract are Claims One, Six, Seven, and Eight in the Proposed Amended Complaint.

<sup>29</sup> (ECF No. 96.)

<sup>30</sup> (Defs. Br. Opp'n 28.)

<sup>31</sup> North Carolina law governs Plaintiffs' proposed claims for anticipatory repudiation. *See Husqvarna Prof. Prods., Inc. v. Robin Autopilot Holdings, LLC*, 2023 NCBC LEXIS 155, \*\*

31. The Court’s November Order cannot carry the weight Defendants claim. First, the Court’s ruling did not resolve issues of fact.<sup>32</sup> In addition, the portion of the Court’s ruling upon which Defendants rely was a part of the Court’s conclusion that the March 6 Memo was susceptible to two or more reasonable interpretations; it was not a holding that the Memo could only be read as Defendants contend as a matter of law.<sup>33</sup> Accordingly, Plaintiffs’ Motion for leave to reassert Plaintiffs’ claims for anticipatory repudiation shall be granted.

#### IV.

#### CONCLUSION

32. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **DENIES** the Motion to the extent it seeks to add a claim against Fahey for breach of fiduciary duty, but otherwise **GRANTS** the Motion. Plaintiffs shall file their Proposed Amended Complaint, modified to comply with this Order, no later than 29 December 2023.

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29–33 (N.C. Super. Ct. Nov. 28, 2023) (applying North Carolina law to Plaintiffs’ anticipatory repudiation claims); *see also, e.g., Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428 (2000) (“[T]he substantive law of the state where the last act to make a binding contract occurred . . . controls the interpretation of the contract.”).

<sup>32</sup> (See November Order ¶ 3.)

<sup>33</sup> By way of further background, Robin asserted a claim for breach of contract against Plaintiffs. Plaintiffs moved to dismiss this claim, arguing that Robin extinguished Plaintiffs’ obligations under the contracts by repudiating, and thereby breaching, the contract when it sent the March 6 Memo. (Mem. Supp. Pls.’ Mot. Dismiss Am. Countercls. 15–16, ECF No. 51.) In the November Order, the Court denied Plaintiffs’ motion, holding that Robin’s allegations “did not establish repudiation as a matter of law” and declining to conclude that Plaintiffs obligations were excused by Robin’s conduct. (November Order ¶ 66.)

**SO ORDERED**, this the 22nd day of December, 2023.

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