

STATE OF NORTH CAROLINA  
BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
22 CVS 4135

KRISTIE BIVINS; RYAN BIVINS;  
KRYB LAUNCH, LLC, individually,  
and on behalf of KJ ENDEAVORS, LLC  
and KJ LAUNCH PROPERTIES, LLC,

Plaintiffs,

v.

JENNIFER PACHECO; Z LAUNCH  
LLC; KJ ENDEAVORS, LLC; and KJ  
LAUNCH PROPERTIES, LLC,

Defendants.

**ORDER AND OPINION ON  
DEFENDANTS' MOTION TO DISMISS  
AND  
MOTION FOR MORE DEFINITE  
STATEMENT**

**I. INTRODUCTION**

1. In 2015, Kristie and Ryan Bivins, along with Jennifer and Bret Pacheco, decided to open a trampoline park in Asheville, North Carolina. They formed KJ Launch Properties, LLC (“KJ Launch”) to own the real property, and KJ Endeavors, LLC (“KJ Endeavors”) to operate the park. Years later, after discovering financial irregularities, the Bivins seek relief for misconduct that they attribute to Jennifer Pacheco (“Pacheco”), formerly the bookkeeper for the business. The Bivins request a judgment declaring that Pacheco’s alleged misconduct triggered the involuntary withdrawal of both Pacheco and her company, Z Launch, LLC (“Z Launch”) pursuant to the operating agreements for the jointly owned LLCs.<sup>1</sup> They also seek judicial dissolution of the LLCs, an accounting, and damages.

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<sup>1</sup> Bret Pacheco is not named as a defendant.

2. The case is before the Court on Pacheco and Z Launch's motion to dismiss the Bivins' claims. Alternatively, Pacheco and Z Launch seek a more definite statement of any claims that survive. (Defendants Jennifer Pacheco's and Z Launch, LLC's Motion to Dismiss the Claims of the Plaintiffs, or in the Alternative, Motion for a More Definitive Statement, "Mot. Dismiss," ["Motion"], ECF No. 11.) For the reasons stated below, the Court **GRANTS** in part and **DENIES** in part the Motion to Dismiss and **DENIES** the Motion for More Definite Statement.

*Fitzgerald, Hanna & Sullivan, PLLC, by Andrew L. Fitzgerald and D. Stuart Punger, Jr. for Plaintiffs Kristie Bivins, Ryan Bivins, KJ Endeavors, LLC and KJ Launch Properties, LLC.*

*Marshall, Roth & Gregory, PC, by Clifford C. Marshall, Jr. for Defendants Jennifer Pacheco and Z Launch LLC.*

Earp, Judge.

## II. FACTUAL BACKGROUND

3. When ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule[s]"), the Court does not find facts but rather recites the facts as alleged. Therefore, the following facts are drawn from Plaintiffs' Verified Amended Complaint, (Am. Compl., ECF No. 8), and its attached exhibits, (ECF Nos. 8.1-8.7).

4. KRYB Launch, LLC ("KRYB") is a North Carolina limited liability company with its principal place of business in Buncombe County, North Carolina. (Am. Compl. ¶ 5.) It is managed by Kristie and Ryan Bivins. (Am. Compl. ¶ 5.)

5. Z Launch is a North Carolina limited liability company with its principal place of business in Buncombe County, North Carolina. (Am. Compl. ¶ 7.) It is “principally controlled” by Jennifer Pacheco and Bret Pacheco. (Am. Compl. ¶ 7.)

6. KRYB and Z Launch are both 50 percent members in, and managers of, KJ Endeavors, a North Carolina limited liability company that manages the trampoline park. (Am. Compl. ¶ 9.)

7. Another North Carolina limited liability company, KJ Launch, owns the property on which the trampoline park is located. (Am. Compl. ¶¶ 11-12.)

8. KJ Launch’s Operating Agreement, executed on 22 January 2015, states that Ryan Bivins, Kristie Bivins, Jennifer Pacheco and Bret Pacheco each own 25 percent of the company. (Am. Compl. ¶ 15.) Plaintiffs believe, however, that in March 2017, Jennifer Pacheco obtained Bret’s twenty five percent interest as a result of a separation and property settlement agreement in their divorce. (Am. Compl. ¶¶ 17, 28.) Kristie and Ryan complain that Jennifer hid the transfer of Bret’s interest from them and breached the KJ Launch operating agreement by not giving them an opportunity to purchase his interest. (Am. Compl. ¶ 18.)

9. The Bivins allege that Pacheco was given responsibility for maintaining the financial records of both KJ Endeavors and KJ Launch. (Am. Compl. ¶ 19.) In addition to bookkeeping, her duties included overseeing the check writing, accounting, and tax compliance for both companies. (Am. Compl. ¶¶ 19, 37-38.)

10. Plaintiffs allege that Pacheco used her position to misappropriate thousands of dollars from the trampoline park. (Am. Compl. ¶ 20.) The Bivins believe

that the transfers occurred prior to the Pachecos' 2017 divorce. (Am. Compl. ¶¶ 25, 28.)

11. Aside from keeping the books, the Bivins complain that Pacheco did not “meaningfully assist” with the day-to-day operation of the trampoline park. (Am. Compl. ¶ 27.)

12. Through counsel, Kristie Bivins, Ryan Bivins, and KRYB made a derivative demand on behalf of KJ Endeavors and KJ Launch on 1 September 2022. (ECF No. 8.6.) Jennifer Pacheco and Z Launch responded with their own derivative demand. (ECF No. 8.7.) Both sides claim that the other has engaged in misappropriation of funds, among other wrongs.

### **III. PROCEDURAL BACKGROUND**

13. Plaintiffs initiated this action on 4 November 2022. (Verified Complaint, ECF No. 3.) On 8 November 2022, the case was designated a mandatory business case. (Designation Order, ECF No. 1.) On 8 December 2022, Defendants moved to dismiss the original action. (Motion to Dismiss, ECF No. 6.) Plaintiffs responded by amending their pleading on 29 December 2022. (*See generally* Am. Compl.)

14. The Amended Complaint purports to allege eight claims against Jennifer Pacheco and Z Launch: (1) breach of fiduciary duty; (2) fraudulent conveyance; (3) fraud; (4) breach of both companies' operating agreements; (5) involuntary withdrawal of Z Launch from KJ Endeavors; (6) involuntary withdrawal of Jennifer Pacheco from KJ Launch Properties; (7) “derivative action”; and (8) dissolution and accounting of KJ Launch Properties and KJ Endeavors.

15. On 17 January 2023, Jennifer Pacheco and Z Launch filed the Motion. Following briefing, on 21 February 2023, the Court entertained arguments during a hearing at which the parties participated through counsel. (Notice of Hr'g, ECF No. 13.) The Motion is now ripe for disposition.

#### IV. ANALYSIS

##### A. Standing

16. Defendants move pursuant to Rule 12(b)(1) to dismiss any cause of action that Plaintiffs attempt to assert as a direct claim because they lack standing. “Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction.” *Aubin v. Susi*, 149 N.C. App. 320, 324 (2002) (citation omitted). It refers to whether a party has “sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter.” *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 626 (2002); *see also Leonard v. Ast*, 2022 NCBC LEXIS 76, at \*\*7 (N.C. Super. Ct. July 13, 2022) (“Standing is a question of subject matter jurisdiction, which is a prerequisite to the exercise of any authority by the state courts.” (quoting *Phillips & Jordan v. Bostic*, 2012 NCBC LEXIS 36, at \*7 (N.C. Super. Ct. June 1, 2012))).

17. Defendants argue that Plaintiffs lack standing to bring any direct action against them because they have not alleged a legally cognizable “special duty” or “separate and distinct injury” as required by *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658 (1997). (Defs.’ Mem. of Law in Supp. of Mot. to Dismiss Pls.’ Am. Verified Compl., [“Defs.’ Br.”] 5, ECF No. 13.) However, with respect to the first three

causes of action (breach of fiduciary duty, fraudulent conveyance, and fraud), the Court observes that Plaintiffs specify that the claims are brought derivatively on behalf of KJ Endeavors and KJ Launch and not as direct causes of action. (*See* Am. Compl. ¶ 63.)

18. In contrast, Plaintiffs characterize their fourth (breach of operating agreements), fifth (involuntary withdrawal of Z Launch from KJ Endeavors), sixth (involuntary withdrawal of Jennifer Pacheco from KJ Launch), and eighth (dissolution and accounting of KJ Launch and KJ Endeavors) claims as “likely” direct claims, as well as derivative ones. (Am. Compl. ¶¶ 74, 106, 117, 129.)<sup>2</sup> Accordingly, the Court addresses Plaintiffs’ standing to bring each of these claims directly.

19. The general rule is that shareholders may not bring individual actions to recover what they consider to be their portion of the damages suffered by a corporation. *Barger*, 346 N.C. at 660. This rule also applies in the LLC context. *See, e.g., Bennett v. Bennett*, 2019 NCBC LEXIS 19, at \*13 (N.C. Super. Ct. Aug. 6, 2019) (“These rules apply equally to LLCs and their members because the members are, for this purpose, functionally equivalent to corporate shareholders.” (cleaned up)); *see also SCA-Blue Ridge, LLC v. WakeMed*, 2016 NCBC LEXIS 2, at \*\*23 (N.C. Super. Ct. Jan. 4, 2016) (members of an LLC are treated like corporate shareholders).

20. However, “an LLC member may maintain an individual action against a fellow LLC member for harm that ‘directly affects’ the member if he can show ‘that the wrongdoer owed him a special duty or that the injury suffered by the member is

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<sup>2</sup> Claim seven is not a claim but is rather a restatement of Plaintiffs’ request that Defendants take the actions set forth in Plaintiffs’ derivative demand.

separate and distinct from the injury sustained by the other members or the LLC itself.’” *Sivadhanam v. 7 Hills Learning, LLC*, 2021 NCBC LEXIS 74, at \*13 (N.C. Super. Ct. Sept. 8, 2021) (quoting *Barger*, 346 N.C. at 659.) Defendants contend that neither of the two *Barger* exceptions is applicable in the present case. (Defs.’ Br. 5-6.) The Court disagrees.

21. The fourth cause of action is for various breaches of the KJ Endeavors and the KJ Launch operating agreements. Whether the claim is derivative or direct turns on whether the relevant term in the operating agreement gives rise to a duty owed generally to the company or only to a member. *See, e.g., 759 Ventures, LLC v. GCP Apt. Inv’rs, LLC*, 2018 NCBC LEXIS 82, at \*10-11 (N.C. Super. Ct. Aug. 13, 2018) (“To the extent the relevant term in an operating agreement gives rise to a duty owed to the company, a claim for breach of that duty is one belonging to the company, and not generally to its members or managers.”). If the harm is the same to the company and its members, the claim is derivative. *See, e.g., White v. Hyde*, 2016 NCBC LEXIS 74, at \*\*24-25 (N.C. Super. Ct. Oct. 4, 2016) (no direct claim for breach of operating agreement where harm to company and individual was the same); *Miller v. Burlington Chem. Co., LLC*, 2017 NCBC LEXIS 6, at \*15 (N.C. Super. Ct. Jan. 27, 2017) (no direct claim where alleged injury affected all members equally).

22. Here, Plaintiffs allege breaches that impacted all members of the LLCs equally (giving rise to derivative claims), but they also allege at least one breach of the KJ Launch operating agreement that impacted only Kristie and Ryan Bivins. That breach, which supports a direct claim for a distinct injury, allegedly occurred

when Pacheco accepted the transfer of Bret's membership interest without giving Kristie and Ryan Bivins the opportunity to purchase Bret's interest. (Am. Compl. ¶ 82.) Having been denied that opportunity, Kristie and Ryan Bivins have a direct cause of action against Pacheco. *See, e.g., Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 612 (2018).

23. As for the balance of claim four, as well as claims five, six, and eight Plaintiffs have standing to assert them regardless of *Barger*. Although not stated with clarity, in claims four, five and six Plaintiffs seek a judgment that Pacheco, individually and as manager for Z Launch, breached the operating agreements of KJ Launch and KJ Endeavors by engaging in misconduct sufficient to result in the involuntary withdrawal of Jennifer Pacheco from KJ Launch (triggering purchase rights for the Bivins), and the involuntary withdrawal of Z Launch from KJ Endeavors (triggering purchase rights for KRYB). (ECF No. 8.1 ¶ 34, ECF No. 8.2 ¶ 33.) Plaintiffs have standing to pursue an action to declare these rights. *See, e.g., Epic Chophouse, LLC v. Morasso*, 2019 NCBC LEXIS 55, at \*13 (N.C. Super. Ct. Sept. 3, 2019) (by statute, parties to an operating agreement have standing to seek an interpretation of its terms); *see also* N.C.G.S. § 1-254 (“Any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder.”)<sup>3</sup>

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<sup>3</sup> However, a declaratory judgment is unavailable “if the statute of limitations bars any claim, because ‘jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests



24. As for claim eight, demanding that both KJ Launch and KJ Endeavors be dissolved, it is unnecessary to resort to the *Barger* exceptions. A current member of an LLC has standing to bring an action for dissolution. N.C.G.S. § 57D-6-02(2). Therefore, Plaintiffs have standing and the Court has jurisdiction over this claim.

### **B. Statute of Limitations**

25. Defendants next move pursuant to Rule 12(b)(6) to dismiss each claim on statute of limitations grounds. (Defs.' Br. 10-15.) "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the [complaint] that such a statute bars the claim." *Futures Grp., Inc. v. Brosnan*, 2022 NCBC LEXIS 150, at \*\*10-11 (N.C. Super. Ct. Dec. 7, 2022) (citing *Horton v. Carolina Medicorp*, 344 N.C. 133, 136 (1996)).

26. The Court's inquiry at the Rule 12(b)(6) stage is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987) (citation omitted). The Court is not constrained to analyze each claim as it is titled in the Amended Complaint. Rather, it treats the well-pleaded allegations of the pleading as true and views the facts and permissible inferences in the light most favorable to the non-moving party when determining whether a claim exists. *See, e.g., Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156 (1986) ("A motion to dismiss for failure to state a claim . . . is addressed to whether the facts alleged in the complaint, when viewed

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in the matter in dispute.'" *Ludlum v. State*, 227 N.C. App. 92, 94 (2013) (quoting *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338 (1984)).

in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory.”).

27. Beginning with the breach of fiduciary duty claim, the applicable statute of limitations is three years. See N.C.G.S. § 1-52(1). The action accrues when a party knew or should have known of the facts giving rise to the claim. See *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66-67 (2005).<sup>4</sup>

28. Likewise, the statute of limitations for fraud is three years, see N.C.G.S. § 1-52(9), and fraud actions “shall not be deemed to have accrued until the discovery by the aggrieved party of facts constituting the fraud[.]” *Id.* “‘Discovery’ is defined as actual discovery or the time when the fraud should have been discovered in the exercise of due diligence.” *Carlisle v. Keith*, 169 N.C. App. 674, 683 (2005).

29. Contract actions are no different. Under N.C.G.S. § 1-52(1), the applicable statute of limitations is three years. As with the tort claims, our Supreme Court has held that “a claim for breach of contract accrues when the plaintiff knew or should have known that the contract had been breached[.]” *Chisum v. Campagna*, 376 N.C. 680, 720 (2021); accord *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5

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<sup>4</sup> Plaintiffs rely on *Wortman v. Hutaff*, 2016 NCBC LEXIS 37 (N.C. Super. Ct. May 11, 2016) to argue that Defendants Pacheco and Z Launch, as managers, had a continuing fiduciary duty to reimburse their respective companies for any monies misappropriated. According to Plaintiffs, this continuing duty prevents the running of the statute of limitations. (Pls.’ Resp. Br. 12.) However, *Wortman* does not support their position. The continuing-wrong doctrine “applies when there is a wrong that was ‘occasioned by continual unlawful acts’ but it does not apply when there are only continual harmful effects from an earlier singular wrongful act.” *Wortman*, 2016 NCBC LEXIS 37, at \*13 (quoting *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179 (2003)). Plaintiffs allege individual acts of theft resulting in continual harmful effects.

(2017) (“We have long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim.”).

30. Determining when the wrong should have been discovered is ordinarily a question reserved for the fact-finder. *See, e.g., Forbis v. Neal*, 361 N.C. 519, 524 (2007) (“Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances.”). Dismissal is appropriate, however, if the Amended Complaint on its face discloses facts defeating Plaintiffs’ claims. *See Carlisle*, 169 N.C. App. at 681.

31. Defendants observe that the improper transfers of money are dated between November 2015 and January 2019. They argue that Plaintiffs, as co-managers who claim they were allegedly forced to handle the day-to-day operations of the companies because of Pacheco’s lack of effort, should have discovered the fraud when it occurred through the exercise of ordinary diligence. (Defs.’ Br. 12-13.)

32. Plaintiffs respond that they discovered the wrongdoing as a result of an investigation that took place at some point after the misappropriation occurred. (Resp. Br. Opp’n Mot. Dismiss or For More Definite Statement, [“Pls.’ Resp. Br.”] 10, ECF No. 14.) The Amended Complaint is silent, however, regarding *when* they conducted the investigation and made the discovery. Plaintiffs state only in the passive voice that “[i]nvestigation has shown” that Pacheco “secreted thousands of dollars of money from both companies.” Nevertheless, at the Rule 12(b)(6) stage, our Court of Appeals has held that a plaintiff’s silence with respect to the facts necessary

to determine the date of discovery is not a sufficient basis for dismissal. *Russell v. Adams*, 125 N.C. App. 637, 641 (1997).<sup>5</sup>

33. As for Plaintiffs' allegation that Pacheco breached the KJ Launch operating agreement by not giving the Bivins an opportunity to purchase Bret's membership, Plaintiffs allege that they now believe that the transfer happened in March 2017 "via a Separation and Property Settlement Agreement" and after criminal charges were brought against Bret in 2017. (Am. Compl. ¶¶ 17, 28.) Again, however, they do not allege when they discovered the breach, and they benefit from their silence at the Rule 12(b)(6) stage. Accordingly, as to the first four claims, Defendants' motion to dismiss shall be DENIED.<sup>6</sup>

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<sup>5</sup> Writing separately, Judge Wynn disagreed with the majority's reasoning:

I disagree with the majority's position that a silent complaint may afford plaintiff the benefit of a discovery rule such as N.C.G.S. § 1-52(16). In my view, a complaint which indicates two specific acts occurring outside the statute of limitations, such as the complaint at hand which alleges that the acts causing severe emotional distress took place in June 1989 and on 8 September 1992, must further set forth in the pleadings facts sufficient to show when the "bodily harm to the claimant . . . [became] or ought reasonably to have become apparent to the claimant." N.C.G.S. § 1-52(16). Since the discovery rule of N.C.G.S. § 1-52(16) provides that the cause of action will not accrue until this time, the complaint should indicate the time the injury occurred or reasonably manifested itself to plaintiff.

*Russell v. Adams*, 125 N.C. App. 637, 642 (1997) (Wynn, concurring).

<sup>6</sup> Plaintiffs argue that they should be permitted to conduct discovery to determine the applicability of equitable estoppel. (Pls.' Resp. Br. 11.) However, "[i]n order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant." *Loray Master Tenant, LLC v. Foss N.C. Mill Credit*, 2021 NCBC LEXIS 15, at \*22 (N.C. Super. Ct. Feb. 18, 2021). Although Plaintiffs allege that Jennifer Pacheco duped them into believing that she was handling the books "in good faith and in the best interest of [the] companies," (Am. Compl. ¶ 56), nowhere in the Amended Complaint do Plaintiffs allege that they were aware of their claims but were induced not to file them. Equitable estoppel, therefore, does not apply under the facts alleged here. See *A.H. Beck Found. Co. v. Jones Bros.*, 166 N.C. App. 672, 683 (2004)

34. In addition, while not enumerated as a claim, the Court observes that Plaintiffs have alleged that they trusted Pacheco and her company, Z Launch, with the trampoline park's finances and that she abused that trust for her own personal gain. (Am. Compl. ¶¶ 1, 19, 21-25, 49, 57, 61, 70, 81, 90, 99, 110.) These allegations are sufficient to state derivative claims on behalf of KJ Endeavors and KJ Launch for constructive fraud. *See Barger*, 346 N.C. at 666 (“In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a relation of trust and confidence which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff . . . [T]he defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself.”) (cleaned up); *Fox v. Fox*, 283 N.C. App. 336, 352 (2022) (“[t]he primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the intent and showing that the defendant benefitted from his breach of duty.”). This is true despite Plaintiffs’ failure to identify the claim *per se*. *See Bradshaw v. Maiden*, 2022-NCCOA-917, ¶ 47 (2022) (“labels as to legal theories which a plaintiff gave his claims in the complaint are not controlling” (quoting *Haynie v. Cobb*, 2017 N.C. App. 143, 148-49 (2010) (cleaned up))).

35. The statute of limitations for constructive fraud is ten years. *Babb v. Graham*, 190 N.C. App. 463, 480-81 (2008) (citing N.C.G.S. § 1-56). Given that the

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(“In order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant.”).

alleged misconduct necessarily occurred at some point after the parties began their venture in 2015, this claim remains well within the ten-year statute of limitations. Plaintiffs may proceed with derivative claims for constructive fraud.

**C. Rule 9(b)**

36. Returning to the fraud counts, Defendants contend that Plaintiffs have not satisfied the pleading requirements of Rule 9(b). (Defs.' Br. 15-16.) They cite *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974) for the proposition that Pacheco's alleged promise to operate the finances and books of the companies in good faith was simply an aspirational, forward-looking opinion rather than a statement of material fact. (Defs.' Br. 16.)

37. Plaintiffs rely on detail provided in the exhibits, including redacted checks, (ECF No. 8.3), credit card statements, (ECF No. 8.4), and a health insurance ledger, (ECF No. 8.5), to support their contention that they have satisfied Rule 9(b)'s particularity requirements. (Pls.' Resp. Br. 7.) They contend that the allegations in paragraphs 55-61 of their Amended Complaint that defendants "claimed they would behave in one way, but they knew all along that they would not, and then they looted the companies co-owned with the plaintiffs," is a misrepresentation of material fact giving rise to an actionable fraud. (Pls.' Resp. Br. 14.)

38. When asserting a claim for fraud, Rule 9(b) requires allegations of "the time, place and contents of the fraudulent representation, the identity of the person making the representation and what was obtained by the fraudulent acts or

representations” to be pleaded with particularity. *Terry v. Terry*, 302 N.C. 77, 85 (1981) (emphasis omitted).

39. When evaluating the Amended Complaint, the Court may consider documents “attached to and incorporated within the pleadings without converting a Rule 12(b)(6) or Rule 12(c) motion into one for summary judgment.” *Brown v. Secor*, 2017 NCBC LEXIS 65, at \*\*11 (N.C. Super. Ct. July 28, 2017) (quoting *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204 (2007) (cleaned up)).

40. As stated previously, some of the attached exhibits are dated, but others lack sufficient detail to determine when the transaction occurred. The pleading fails to meet Rule 9(b)’s particularity requirements with respect to the undated transactions. Accordingly, Defendants’ motion to dismiss the fraud claims with respect to the undated transactions shall be GRANTED, without prejudice. With respect to the dated transactions, the Motion to Dismiss shall be DENIED.<sup>7</sup>

41. As for Pacheco’s alleged representation that she would “operate the finances, books and records of KJ Endeavors and KR Launch Properties in good faith and in the best interest of those companies,” such a promise is not an opinion. If, as alleged, the promise was made knowing that it was false and with the intention to

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<sup>7</sup> Plaintiffs also attempt a claim for “fraudulent conveyance,” but the facts alleged do not support such a claim. Most apparently, Plaintiffs fail to plead that the Pacheco Defendants were debtors or that Plaintiffs were creditors. Nor do they cite the Uniform Voidable Transactions Act, N.C.G.S. § 39-23.1 *et seq.* Moreover, as Defendants argue, Rule 9(b)’s heightened pleading requirements also apply to claims for fraudulent conveyance. *See Azure Dolphin, LLC v. Barton*, 2017 NCBC LEXIS 90, at \*26 (N.C. Super. Ct. Oct. 2, 2017). Consequently, to the extent it relies on the undated transactions, Plaintiffs’ second claim for relief fails on this basis as well.

deceive, *Ragsdale* does not support dismissal at this stage. *See, e.g., Vincent v. Corbett*, 244 N.C. 469, 471 (1956) (“[A] promissory representation containing all the elements of fraud, made merely to induce the promisee to act to his disadvantage, with intent not to comply, wherein the intent is regarded as a subsisting fact, will support an action in fraud.”).

42. However, just as Plaintiffs have not met Rule 9(b)’s particularity requirements with respect to the undated transactions, they have not met them with respect to the promissory representation. Therefore, Defendants’ Motion to Dismiss the fraud claim premised on this representation is GRANTED, without prejudice.

#### **V. Motion for More Definite Statement**

43. Alternatively, Plaintiffs move pursuant to Rule 12(e) for a more definite statement of any surviving claims. This motion requires the Court to consider whether the Amended Complaint “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” *Leonard*, 2022 NCBC LEXIS 76, at \*\*17 (quoting N.C. R. Civ. P. 12(e)). These motions are “not favored by the courts and are sparingly granted because pleadings may be brief and lacking in factual detail, and because of the extensive discovery devices available to the movant.” *Id.* (cleaned up).

44. “[A] statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought.” *Sutton v. Duke*, 277 N.C. 94, 102 (1971) (internal quotation omitted). “If the contested



pleading meets the standards of North Carolina Rule of Civil Procedure 8 and the opposing party is adequately notified of the nature of the claim, a motion for a more definite statement should be denied.” *Leonard*, 2022 NCBC LEXIS 76, at \*\*17.

45. While not a model of clarity, the Court determines that the surviving claims meet the requirements of Rule 8 and enable Defendants to conduct the necessary discovery. Accordingly, Defendants’ Motion for More Definite Statement is DENIED.

## VI. CONCLUSION

46. WHEREFORE, for the reasons stated herein, the Court hereby ORDERS as follows:

- a. Defendants’ Motion to Dismiss is GRANTED in part and DENIED in part.
  - i. The Motion to Dismiss is GRANTED as to Claim 2 (fraudulent conveyance), and that claim is DISMISSED with prejudice;
  - ii. The Motion to Dismiss is GRANTED as to Claim 3 (fraud) to the extent the claim is based on either the undated transactions or the promissory representation, and to that extent the claim is DISMISSED without prejudice;<sup>8</sup>
  - iii. The Motion to Dismiss is DENIED as to the remaining claims.
- b. Defendants’ Motion for More Definite Statement is DENIED.

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<sup>8</sup> “The decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]” *First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013).

IT IS SO ORDERED, this the 2nd day of June, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp  
Special Superior Court Judge  
for Complex Business Cases