STATE OF NORTH CAROLINA WAKE COUNTY JESSE H. SHAVER, Plaintiff, v. AARON L. WALKER and VADUM, INC., Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 11080 **ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS**

1. The individual parties in this case are estranged family members. Plaintiff, Jesse Shaver, ("Shaver"), is suing his brother-in-law, Aaron Walker ("Walker") and the company Walker founded, Vadum, Inc. ("Vadum") for, among other things, alleged fraud. Shaver asserts that, at Walker's urging, he did not exercise vested stock options prior to their expiration date. Instead, Shaver alleges he trusted Walker, his family member and CEO of Vadum, to safeguard his right to exercise those options at a later date. Unfortunately, that later date never came, and Shaver claims that Walker tricked him into losing his right to equity in Vadum.

2. Shaver filed a verified Complaint on 2 September 2022, asserting three claims: fraud, breach of fiduciary duty and constructive fraud (pleaded together), and negligent misrepresentation. (*See* ECF No. 4.)

3. On 16 November 2022, Walker and Vadum filed their Motion to Dismiss (the "Motion"), (ECF No. 11). They contend that the Complaint should be dismissed in its entirety pursuant to Rules 9(b) and 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule(s)") because it fails to state a claim against either of them.

4. For the reasons stated below, the Motion is **GRANTED in part** and **DENIED in part**.

Bell, Davis & Pitt, P.A., by Joshua B. Durham, Alan M. Ruley, and Carson D. Schneider, for Plaintiff Jesse H. Shaver.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Jackson W. Moore, Jr. and Amelia Larrick Serrat, for Defendants Vadum, Inc. and Aaron L. Walker.

Earp, Judge.

I. BACKGROUND

5. The Court does not make findings of fact when ruling on a motion to dismiss. It recites the factual allegations in the Complaint that are relevant and necessary to the Motion.

6. Both Shaver and Walker are residents of Wake County, North Carolina. (Compl. ¶¶ 1-2, ECF No. 4.) Walker is Shaver's brother-in-law. (Compl. ¶ 7.)

7. Shaver met Walker in 1992, when Shaver's sister Emily and Walker started dating. Shaver was 13 years old at the time. Shaver "liked Walker, looked up to him, and began to develop a bond of trust with him." In June 1994, Walker and Emily were married. (Compl. ¶ 8.)

8. Vadum is a North Carolina corporation with a principal place of business in Raleigh, North Carolina. It provides "engineering, science and technology services and specializes in government defense contracts." (Compl. ¶ 3.) Walker and Dr. Peter Buff ("Buff") founded Vadum in 2004. Walker was President, and Buff was Vice-President of the company. Both were shareholders. (Compl. ¶ 9.)

9. In 2007, Gary Edge ("Edge") was hired to be Vadum's CEO. Edge ultimately became a shareholder of Vadum.[1] (Compl. ¶ 11.)

10. In March 2009, Walker allegedly "removed" Buff from the company. Litigation followed. (Compl. ¶ 12.) The lawsuit was settled and dismissed in June 2009. Pursuant to the terms of the settlement, Buff redeemed his company stock. (Compl. ¶ 13.)

11. In September of that year, Vadum established an Incentive Stock Option Plan for certain employees. (Compl. ¶ 14.)

12. Meanwhile, Shaver was completing his education. He finished graduate school in 2009, and in April 2010, Shaver was approached by Walker to work for Vadum as a non-employee consultant. Walker offered Shaver the opportunity to have an equity interest in Vadum as consideration for Shaver's future inventions. The offer was reflected in a document titled, "Form of Agreement for Non-Employees." (Compl. ¶¶ 15-16.)

13. By May 2010, Shaver had begun working part-time for Vadum, first as an independent contractor and later as a part-time employee. When Shaver subsequently became the Principal Investigator on a contract with the U.S. Army that he drafted, however, the contract required that he transition to full-time employee status. Consequently, since 3 September 2010, Shaver has worked as a full-time employee for Vadum. (Compl. ¶¶ 17-18.)

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[1] The number of shares owned by Edge is not specified in the Complaint.

14. Shaver alleges that, over the years, he "became a valued employee of Vadum and a close colleague of Walker." (Compl. ¶ 46.) Among other things, Shaver invented a new technology for Explosive Ordnance Disposal (EOD), a development that he claims has "substantial commercial value." (Compl. ¶ 47.) He alleges that he has won over seventeen major contracts for Vadum from ten military customers and has secured "millions of dollars" in contract obligations for Vadum, helping the company to become "the second-most winning SBIR [Small Business Innovation Research] firm in the state of North Carolina." (Compl. ¶ 49.) Additionally, Shaver alleges that he has "generated considerable valuable intellectual property that is now assigned to Vadum, including SBIR Data Rights and US Patents." (Compl. ¶ 52.)

15. Throughout these years, Shaver and Walker's relationship grew stronger as well. Their respective families travelled together, spent holidays together, went to church together, hosted each other for meals and overnight stays, worked on each other's homes, and performed numerous acts of service for one another. (Compl. ¶¶ 35-41.) Shaver alleges that "[t]he families had great affection for each other, trusted each other, and turned to each other for assistance and advice in times of need." (Compl. ¶ 42.) In addition, Shaver alleges that he viewed Walker, his older brother-in-law, with "respect, admiration, confidence and trust[.]" (Compl. ¶ 44.) He further alleges that when he became an employee of Vadum, their relationship developed "a new dimension, where Walker was now a business superior (employer and owner), while remaining a highly trusted elder family member and friend." (Compl. ¶ 45.)

16. According to Shaver, he accepted "below-market salary" to work at Vadum because he trusted Walker's promise that he would become an equity owner in the company. (Compl. ¶ 53.)

17. In 2012, Shaver became a participant in the company's Incentive Stock Option Plan. He was granted options on 6,500 shares at an exercise price of $.30 per share. A third of the options vested on 24 September 2013, another third vested a year later, and Shaver was fully vested on 24 September 2015. The options had a final exercise date of 24 September 2019. (Compl. ¶ 19.)

18. The Vadum Stock Option Agreement ("Agreement") provides in part:

> Amendment. Except as set forth in Section 9(c) [pertaining to amendments necessitated by Tax Code Section 409A], this Agreement may not be modified or amended in any manner adverse to the Participant's interest except by means of a writing signed by the Company and Participant.

(Compl. Ex. B.)

19. In addition, a memorandum addressing "commonly asked questions" concerning the Incentive Stock Option Plan attached as an exhibit to the Complaint warned: "[Y]ou should consult your own legal counsel or tax advisor prior to exercising your option or selling the Shares. (Compl. Ex. A, (emphasis in original).)[2]

20. Shaver alleges that he is "highly educated" but that he is not trained in financial or legal matters. (Compl. ¶ 55.) Furthermore, Shaver says that he did not have access to Vadum's financial information. It was Walker who possessed the

[2] While it is attached to, and referenced in, the Complaint, there is no allegation that Shaver actually received the memorandum that is Exhibit A.

financial information and "had complete authority and discretion to make decisions on behalf of the company." (Compl. ¶ 54.)

21. During the first few days of July 2019, as the deadline approached to exercise his options, Shaver spoke with then-CEO Edge about exercising the options before their September expiration date. The Complaint alleges that Edge, speaking on behalf of Vadum, responded that:

a. There was no monetary benefit to exercising the options before an initial public offering ("IPO");

b. The options could not be exercised at that point, because the "paperwork needed to be fixed;"

c. Shaver should not worry, because the options would not expire, and the company would fix the situation;

d. Exercising the options would make tax matters too complex; and

e. Shaver should "trust [him]."

(Compl. ¶¶ 20-21.)

22. Shaver alleges that these statements were false and made "in an effort to dissuade him from exercising the options." (Compl. ¶ 20.)

23. Less than a week later, Shaver alleges that Walker made similar false statements while at a family campsite in Falls Lake, North Carolina. (Compl. ¶ 22.) Shaver asked Walker about exercising his vested stock options and about Edge's assertion that his options could not be exercised. (Compl. ¶ 22.) Walker, "individually and on behalf of Vadum," allegedly replied that:

a. There was no benefit to exercising the options before an IPO;

b. Shaver did not need to worry about his options expiring;

c. The tax paperwork was too complex for the options to be exercised; and

d. [Shaver should] "[t]rust [him].

(Compl. ¶ 22.)

24. Shaver alleges that he reasonably relied on these statements by Walker and Edge and that they dissuaded him from exercising his options before the expiration date. Shaver further alleges that Walker and Edge's statements "were reasonably calculated to deceive" and "were made with the intent to deceive[.]" (Compl. ¶¶ 24-25.) Absent the alleged misrepresentations, Shaver claims he would have exercised his options, owned 6,500 shares of Vadum, and participated in distributions based on his ownership. (Compl. ¶ 24.)

25. Shaver contends that he trusted Walker and Edge because of their access to and control of information regarding Vadum's finances—especially in light of his own lack of access to Vadum's information, the discretion Walker and Edge had to make decisions regarding management matters, his own lack of training in financial and legal matters, and both Walker and Edge's encouragement that he should trust them, among other reasons. (Compl. ¶¶ 25, 54-55.)

26. Chief among the reasons Shaver trusted Walker, however, was Shaver's decades-long relationship with his brother-in-law, beginning when Shaver was only 13 years old. (Compl. ¶¶ 25, 34.) In addition to his close friendship with Walker, Shaver alleges that Walker's role as Shaver's employer and owner of Vadum resulted in a power imbalance between them. (Compl. ¶ 45.)

27. Ultimately, Shaver did not exercise his options before their 24 September 2019 expiration date and, consequently, he did not become a shareholder in Vadum. (Compl. ¶ 57.) Edge left the Company in July 2020, and Walker assumed the CEO role. (Compl. ¶ 20.) Shaver alleges that as a result of Edge and Walker's false statements, Walker is Vadum's sole shareholder and maintains complete control of the company. (Compl. ¶ 57.)

28. Shaver brings this suit against Walker and Vadum for: (1) fraud (against Walker and Vadum), (2) breach of fiduciary duty and constructive fraud (against Walker), and (3) negligent misrepresentation (against Walker, in the alternative). (*See generally* Compl.)

29. Defendants have moved to dismiss all claims pursuant to Rules 12(b)(6) and 9(b). (*See* ECF No. 11.) On 14 February 2023, the Court held a hearing on the Motion during which all parties appeared and were heard through counsel. (*See* ECF No. 23.) The Motion is now ripe for disposition.

II. STANDARD OF REVIEW

30. Dismissal of a claim is proper if "(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). Otherwise, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under

any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (emphasis omitted).

31. When deciding a motion to dismiss, the Court construes the complaint liberally and accepts all factual allegations as true. *See, e.g., Sykes v. Health Network Sols., Inc.,* 372 N.C. 326, 332 (2019); *Laster v. Francis,* 199 N.C. App. 572, 577 (2009). The Court, however, is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)). In its review, the Court may consider documents that are the subject of the Complaint and to which the Complaint specifically refers, including a contract. *See, e.g., McDonald v. Bank of N.Y. Mellon Trust Co.*, 259 N.C. App. 582, 586 (2018); *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001).

III. ANALYSIS

32. The Court considers the sufficiency of each of Shaver's claims in turn.

A. Fraud

33. Beginning with Shaver's claim for fraud against Walker and Vadum, the elements that must be alleged are: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526-27 (2007). "A subsisting or ascertainable fact, as

distinguished from a matter of opinion or representation relating to future prospects, must be misrepresented." *Ragsdale v. Kennedy*, 286 N.C. 130, 139 (1974).

34. In addition, the Complaint "must allege with particularity all material facts and circumstances constituting the fraud." *Carver v. Roberts*, 78 N.C. App. 511, 513 (1985). 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).

35. Defendants offer three arguments to support the dismissal of Shaver's fraud claim: (1) the alleged misrepresentations were opinions or legal positions and not statements of material fact, (2) Shaver's reliance was not reasonable, and (3) an intent to deceive is not adequately alleged. (*See generally* Defs.' Memo. Supp. Mot. Dismiss 3-13 ["Supp. Br."], ECF No. 12; Reply Br. Supp. Defs.' Mot. Dismiss 1-10 ["Reply Br."], ECF No. 22.) The Court addresses each argument below.

i. Misrepresentation of Material Fact

36. First, Defendants contend that the Complaint fails to allege a misrepresentation of material fact. Instead, Defendants contend that the alleged misrepresentations were mere expressions of opinion or legal positions. (Supp. Br. 4-6; Reply Br. 2-6.) Shaver retorts that each alleged misrepresentation is one of material fact. (Pl.'s Br. Opp. Defs.' Mot. Dismiss ["Opp. Br."] 5-12, ECF No. 18.)

37. Puffery, or mere expressions of opinion or belief, do not constitute statements of material fact. *See Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332

N.C. 1, 17 (1992) ("distinguishing mere puffing, guesses, or assertions of opinions from representations of material facts"). To be a statement of material fact, the statement must be definite and specific. *See Johnson v. Owens*, 263 N.C. 754, 756 (1965) ("[t]he representation must be definite and specific"); *Warfield v. Hicks*, 91 N.C. App. 1, 8, *disc. rev. denied*, 323 N.C. 629 (1988) (a "general unspecific statement of opinion about the potential future consequences of using beetle infested beams" did not constitute fraud).

38. Similarly, statements of legal position cannot form the basis of a fraud claim. *See, e.g.*, *Dalton v. Dalton*, 164 N.C. App. 584, 587 (2004) ("fraud cannot be premised upon a misrepresentation of law"); *Cross v. Formativ Health Mgmt.*, 439 F. Supp. 3d 616, 627 (E.D.N.C. 2020) (a "party's statement of a legal position or an assertion about its rights or position under the law is not an actionable misrepresentation").

39. Particularly when viewed in the light most favorable to the nonmovant—as the Court must view the allegations at this stage—the statements quoted in the Complaint are sufficiently definite and specific to constitute representations of fact. Edge's statement that there was "no monetary benefit to exercising the options before an initial public offering[,]" similar to Walker's statement that "[t]here was no benefit to exercising the options before an IPO[,]" is not presented as an opinion but rather as a flat statement about the worth of the options at the time. (Compl. ¶¶ 21(a), 22(a).) Similarly, Edge's statement that the options "could not be exercised . . . because the 'paperwork needed to be fixed' " is a

definitive assertion presented as fact. (Compl. ¶ 21(b).) Both men allegedly told Shaver that the options either "would not expire" or that he "did not need to worry about his options expiring" and that he should trust them, implicitly promising to fix whatever needed to be fixed in order for Shaver to benefit from exercising the options. (Compl. ¶¶ 21-22.)

40. Finally, the alleged statements about the exercise of the options making tax matters "too complex" could be interpreted as a plea from both Walker and Edge on behalf of the company for Shaver to delay making his election because of the company's tax situation and/or impending IPO in exchange for their promise to protect his rights. (Compl. ¶¶ 21(d), 22(c).) These statements are neither comparable to the type of hyperbolic language used in sales pitches nor are they statements of opinion or legal position.

41. Furthermore, the facts in the alleged statements are material because they "dissuaded Shaver from exercising his options before the stated expiration date." (Compl. ¶ 24.) *See Keith v. Wilder*, 241 N.C. 672, 675 (1955) ("A false representation is material when it deceives a person and induces him to act."); *Davis v. Sellers*, 115 N.C. App. 1, 11 (1994), *disc. rev. denied*, 339 N.C. 610 (1995) (material if it induces or prevents action). Accordingly, the Court concludes that Shaver has adequately alleged misrepresentations of material fact and included the particulars of those misrepresentations.

ii. Reasonable Reliance

42. Defendants next argue that Shaver failed to plead facts to support his conclusion that he reasonably relied on the alleged misrepresentations. To the contrary, they argue, the circumstances pleaded establish that Shaver's reliance was unreasonable. (Supp. Br. 7-11; Reply Br. 6-9.)

43. Defendants highlight: (1) the Stock Option Agreement's express language warning participants to consult their own legal counsel and tax advisor before exercising the option, (2) the Agreement's conspicuous expiration date of 24 September 2019, (3) the Agreement's condition that all modifications must be in writing if the modification would be adverse to Shaver (as they claim is the case here), (4) Shaver's lack of action for two and a half months after the alleged statements were made when, Defendants argue, an investigation could have "easily" uncovered the truth, and (5) Shaver's sophisticated education and work background, including his experience writing contracts for Vadum. Defendants argue that the only conclusion that can be drawn from the allegations is that Shaver's reliance was unreasonable. (*See generally* Supp. Br. 7-11; Reply Br. 6-9.)

44. Shaver responds that Walker and Edge, as owners and high-ranking corporate officers, had access to Vadum's information that he lacked, as well as the power to change its Incentive Stock Option Plan, if necessary, to rectify the problems they referenced in their statements to him. In contrast, Shaver argues, he had no ability to investigate whether Edge and Walker were telling the truth. Shaver contends that he was limited to asking the two men in charge, and he was duped by

their misrepresentations. (Opp. Br. 12-18.) Furthermore, Shaver asserts that his past dealings with the two men—particularly Walker—gave him no reason to doubt their statements. (Opp. Br. 15-18.)

45. The Court determines that the allegations could support a jury's conclusion that Shaver's reliance was reasonable. Construed liberally, the allegations portray a power imbalance in which Walker and Edge—Vadum's President and its CEO—possessed both superior knowledge and control over the company's financial matters, including its Incentive Stock Option Plan. A jury could find that Shaver's reliance on their statements, particularly when both Walker and Edge are alleged to have urged Shaver to trust them, was reasonable. *See, e.g.*, *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 8 (1912) ("If the fact represented is one which is susceptible of accurate knowledge, and the speaker is or may well be presumed to be cognizant thereof, while the other party is ignorant, and the statement is a positive assertion containing nothing so improbable or unreasonable as to put the other party upon further inquiry or give him cause to suspect that it is false, and an investigation would be necessary for him to discover the truth, the statement may be relied on.").

46. While it is true that "a plaintiff must ordinarily show that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence . . . where, as here, the parties are not on equal footing, and a defendant possessing superior knowledge and/or experience makes a representation without giving the plaintiff reason to suspect the representation is

false, the plaintiff may rely upon that representation." *Slattery v. AppyCity, LLC,* 2021 NCBC LEXIS 24, at *18-19 (N.C. Super. Ct. Mar. 24, 2021) (citing *Walker v. Town of Stoneville*, 211 N.C. App. 24, 34-35 (2011)) (internal quotation marks omitted). *See also Higgins v. Synergy Coverage Sols., LLC*, 2020 NCBC LEXIS 6, at *31-34 (N.C. Super. Ct. Jan. 15, 2020) ("[A] plaintiff may justifiably rely on representations made by a defendant with superior knowledge on a subject where the parties are not on equal footing and nothing about the defendant's representations should have given plaintiff cause to suspect the veracity of the representations."). *Cf. Johnson*, 263 N.C. at 758 ("[A] seller who has intentionally made a false representation about something material, in order to induce a sale of his property, should not be permitted to say in effect, 'You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you.' Courts should be very loath to deny an actually defrauded plaintiff relief on this ground."); *White Sewing Mach. Co.*, 161 N.C. at 8-9 ("It is no excuse for, nor does it lie in the mouth of the defendant to aver that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying: 'You trusted me; therefore, I had the right to betray you.' ").

iii. Intent to Deceive

47. Defendants argue that Shaver has failed to allege that they had the requisite intent to deceive Shaver when Walker and Edge made the alleged misrepresentations. (Supp. Br. 11-13; Reply Br. 9-10.) They contend that, as alleged,

the misrepresentations were nothing more than inadvertently unfulfilled promises. (Supp. Br. 11-13; Reply Br. 10.)

48. Shaver responds by pointing to the language of Rule 9(b), which states that "malice, intent, knowledge and other condition of mind of a person may be averred generally." N.C.G.S. § 1A-1, R. 9(b). In addition, he argues that the cases cited by Defendants involve breaches of contract, a claim not brought here. Finally, he contends that the allegations "show motive, means, opportunity and pattern." (Opp. Br. 18-20.)

49. The Court concludes that Shaver has sufficiently alleged that the Defendants intended to deceive him. While failure to fulfill an obligation, standing alone, does not support a claim of fraud, see *Braun v. Glade Valley Sch., Inc.*, 77 N.C. App. 83, 87 (1985), Shaver has alleged more than just broken promises. He has asserted that false and misleading statements were made by Walker and Edge purposefully in an effort to dissuade him from exercising the options. (*See* Compl. ¶¶ 20, 24.) He has further alleged that the false statements "were reasonably calculated to deceive" and "were made with the intent to deceive[.]" (Compl. ¶ 24.) *See e.g., Williams v. Williams*, 220 N.C. 806, 810-11 (1942) (stating that a promise made fraudulently, that is, with no intention to carry it out, will sustain an action for fraud). Furthermore, unlike the facts and circumstances constituting fraud, which are required to be pleaded with particularity, general statements of malice will suffice when stating a claim. *See* N.C.G.S. § 1A-1, R. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").

50. Because the Court determines that Shaver has met the requirements of Rule 9(b) and has adequately pleaded the elements of fraud, Defendants' Motion with respect to this claim shall be **DENIED**.

B. Breach of Fiduciary Duty and Constructive Fraud

51. Shaver's second claim for relief combines breach of fiduciary duty and constructive fraud into one count. Regardless of whether he is attempting one claim or two, however, in both instances, Shaver must allege the existence of a fiduciary duty and breach of that duty. *McFee v. Presley*, 2022 NCBC LEXIS 74, at **7 (N.C. Super. Ct. July 11, 2022) ("Breach of fiduciary duty and constructive fraud are related, though distinct, causes of action. Essential to each is the existence of a fiduciary relationship."). Additionally, constructive fraud requires the plaintiff to allege that the defendant has taken advantage of his position of trust to benefit himself. *See, e.g., White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294-95 (2004); *Barger v. McCoy, Hillard & Parks*, 346 N.C. 650, 666-67 (1997).

52. Unlike actual fraud, which requires that the alleged misrepresentation be pled with specificity, "[c]onstructive fraud differs . . . in that it is based on a confidential relationship rather than a specific misrepresentation." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 482 (2004) (citing *Barger*, 346 N.C. at 667) (internal quotation marks omitted). Moreover, an intent to deceive is not an essential element of the claim. *See Clay v. Monroe*, 189 N.C. App. 482, 488 (2008) ("Intent to deceive is not an element of constructive fraud." (quoting *White*, 166 N.C. App. at 294)).

53. Fiduciary duties can arise as a matter of law (*de jure*) or from the facts (*de facto*). *See Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355 (2019) ("North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship."). Shaver does not argue that he has alleged the existence of a *de jure* fiduciary relationship; instead, he contends that he has alleged that a *de facto* fiduciary relationship arose between Walker and himself. (Opp. Br. 21 n.11 ("Plaintiff does not allege a *de jure* fiduciary relationship here.").)

54. A *de facto* fiduciary relationship exists where "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Green v. Freeman*, 367 N.C. 136, 141 (2013). "Domination and influence are essential components of a *de facto* fiduciary relationship." *Hart v. First Oak Wealth Mgmt., LLC*, 2022 NCBC LEXIS 81, at **30 (N.C. Super. Ct. July 28, 2022). *See also Abbitt v. Gregory*, 201 N.C. 577, 598 (1931) (a *de facto* fiduciary relationship exists where "there is confidence reposed on one side, and resulting domination and influence on the other").

55. The "facts required to establish such a relationship are exacting[.]" *Hart*, 2022 NCBC LEXIS 81, at **30. "Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has

arisen." *Lockerman v. South River Elec. Mbrshp. Corp.*, 250 N.C. App. 631, 636 (2016) (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613 (2008)). Courts look to the factual circumstances of each situation to determine the existence of a *de facto* fiduciary duty. *See Highland Paving Co. v. First Bank*, 227 N.C. App. 36, 42 (2013) ("Determining whether a fiduciary relationship exists requires looking at the particular facts and circumstances of a given case."); *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 474 (2009) ("Although our courts have broadly defined fiduciary relationships, no such relationship arises absent the existence of dominion and control by one party over another.").

56. Defendants argue that the connection alleged between Walker and Shaver does not rise to the level of a *de facto* fiduciary relationship. They contend that the facts surrounding this close familial relationship, even when combined with the employment relationship that also existed, did not result in "domination" by Walker over Shaver sufficient to create fiduciary duties. (Supp. Br. 13-19; Reply Br. 10-14.)

57. On the other hand, Shaver emphasizes his fidelity to, and confidence in, Walker. He stresses the allegations regarding the beneficence the families demonstrated toward one another. He underscores his relative lack of control at Vadum as Walker's subordinate and his allegation that Walker managed and controlled the company. (Opp. Br. 22-24; Compl. ¶¶ 35-45.)

58. In support of his position, Shaver argues that parallels exist between several cases in which a *de facto* fiduciary relationship was found to exist and his own

case. *See, e.g., Curl v. Key*, 311 N.C. 259 (1984) (grieving siblings, aged 18 and 21, were tricked into signing a "peace paper" that deeded their family home to a close friend of their deceased father, who promised to help stop the harassment and "beating[s]" inflicted by the family's relatives); *Holloway v. Holloway*, 221 N.C. App. 156 (2012) (son encouraged his mother, who was living in "deteriorating living conditions" in California, to move across the country by promising that he would take care of her and let her live in his modular home for the rest of her life if she paid the son's back taxes, mortgage and other expenses, only to evict her two years later); *Can-Dev, ULC v. SSTI Centennial, LLC*, 2018 NCBC LEXIS 9, at *19-20 (N.C. Super. Ct. Jan. 25, 2018) (plaintiff allegedly ceded *all* control over projects to defendants, resulting in defendants having all the financial and technical information, without the ability to monitor the projects' developments, and plaintiff lacking "any mechanism [in the governing contract] to resolve disputes regarding the calculation of amounts owed to Plaintiff").

59. What is conspicuous about these cases, however, is the sheer level of control one party was alleged to have wielded over the other, often as the result of some infirmity or special need. In each situation, the plaintiff was dominated to the point of being essentially helpless in the defendant's hands. In the instant case, however, Shaver and Walker are not so positioned. Shaver is clearly a capable professional. (*See* Compl. ¶¶ 46-53.) He is also alleged to be an educated individual, albeit without specific training in financial and legal matters, who has "personally authored and won seven [government] contracts" worth "millions of dollars" and

"generated considerable valuable intellectual property that is now assigned to Vadum, including . . . US Patents." (Compl. ¶¶ 49, 51-52, 55.) He was afforded rights under the Option Contract that he decided not to exercise. Harkening to the *Lockerman* analogy, he had "cards to play." *See Bourgeois v. Lapelusa*, 2022 NCBC LEXIS 111, at **15 (N.C. Super. Ct. Sept. 23, 2022) ("[Plaintiff] may have been mistreated by the other members, but it happened while he was holding—at the very least—a card or two. In that circumstance, no *de facto* fiduciary duty arises.").[3]

60. Without the existence of a fiduciary relationship, there can be no claim for either breach of fiduciary duty or constructive fraud. Therefore, the Court **GRANTS** the Motion, and Shaver's second enumerated claim shall be **DISMISSED** without prejudice.[4]

C. Negligent Misrepresentation

61. Shaver's final claim, negligent misrepresentation, is asserted against Walker as an alternative to the fraud claim.

62. "[T]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care

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[3] Plaintiff also cites *McFee v. Presley*, 2022 NCBC LEXIS 74 (N.C. Super. Ct. July 11, 2022). In that case, an LLC member was swindled out of her ownership interest in the company by a controlling member who denied her access to company records and misrepresented the value of her interest. Citing the rule that "under special circumstances, a director of a corporation stands in a fiduciary relationship to a shareholder or director in the acquisition of the shareholder's stock[,]" the court determined that "informational inequality along with other special circumstances" that existed in that case could give rise to a fiduciary duty. *McFee*, 2022 NCBC LEXIS 74, at **7-9 (citing *Lazenby v. Godwin*, 40 N.C. App. 487, 494 (1979)). Here, conversely, there is no allegation that Walker sought to acquire Shaver's stock.

[4] "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).

by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988). The tort is "highly fact-dependent," with particular importance on the "question of whether a duty is owed [to] a particular plaintiff[.]" *Marcus Bros. Textiles v. Price Waterhouse, L.L.P.*, 350 N.C. 214, 220 (1999) ("whether liability accrues is highly fact-dependent, with the question of whether a duty is owed a particular plaintiff being of paramount importance") (citing Logan, *N.C. Torts* § 25.30, at 551). "Such a duty commonly arises within professional relationships." *Rountree v. Chowan Cnty.*, 252 N.C. App. 155, 160 (2017).

63. The Court of Appeals summarized the claim this way:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Rountree, 252 N.C. App. at 160 (alteration in original) (quoting *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 534 (2000)). And, as is true of fraud, "[w]hen alleging negligent misrepresentation, a plaintiff must satisfy the heightened pleading standard . . . found in Rule 9." *Oliver v. Brown & Morrison, Ltd.*, 2022 NCBC LEXIS 26, at **15 (N.C. Super. Ct. Apr. 7, 2022).

64. Justifiable reliance in a negligent misrepresentation claim is analogous to reasonable reliance in a fraud claim. *See Marcus Bros. Textiles,* 350 N.C. at 224 (for negligent misrepresentation, the "question of justifiable reliance is analogous to that of reasonable reliance in fraud actions"); *Bucci v. Burns*, 2018 NCBC LEXIS 93,

at *4 (N.C. Super. Ct. Sept. 4, 2018) ("Justifiable reliance is an essential element of claims for fraud . . . and negligent misrepresentation."). Reliance is not justifiable if a plaintiff could have learned the true facts through reasonable diligence and had the opportunity to investigate, but failed to make reasonable inquiry. *See BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 299 (2019); *McGuire v. Lord Corp.*, 2020 NCBC LEXIS 15, *14-15 (N.C. Super. Ct. Feb. 11, 2020). As is true with fraud, because it is highly fact dependent, "the question of justifiable reliance is generally a factual issue for the jury[.]" *Ness v. Jones*, 89 N.C. App. 504, 506 (1988).

65. Walker argues that because he owed no fiduciary duty to Shaver, he owed him no other duty of care. And, as he argued with respect to Shaver's fraud claim, Walker contends that Shaver's own allegations establish that Shaver's reliance on Walker alleged misstatements was unreasonable. Specifically, he contends that Shaver was warned to consult counsel about his options, and the Stock Option Agreement itself does not permit amendment that "in any manner [would be] adverse to the Participant's interest except by means of a writing signed by the Company and Participant." (*See* Compl. Ex. B; Supp. Br. 19-22; Reply Br. 14.)

66. The Court disagrees. Walker allegedly made the representations at issue in the course of business for the purpose of guiding Shaver in a business transaction. While he was under no duty to speak, when he chose to do so, intending for Shaver to rely on his statements, a duty to exercise reasonable care arose. *See Ragsdale*, 286 N.C. at 139 ("The rule is that even though a vendor may have no duty to speak under the circumstances, nevertheless if he does assume to speak he must

make a full and fair disclosure as to the matters he discusses.*"); Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 614 (1983) ("Defendants were under no duty to speak, but once the Company spoke, it was required to make a full and fair disclosure as to the matters discussed.").

67. As for whether Shaver has alleged facts upon which a jury could conclude that he justifiably relied on Walker's statements, the Court first observes that this case is factually dissimilar to cases in which the alleged misrepresentation contradicted an express contract term. *See, e.g., Boone Ford, Inc. v. IME Scheduler, Inc.*, 262 N.C. App. 169, 175-76 (2018) (holding that where a representation is controverted by the express terms of a contract, reliance unjustified as a matter of law). In this case, Walker is alleged to have implicitly promised to use his authority so that Shaver did not have to worry about the expiration date. To the extent that fulfilling this promise would have required an amendment to the Option Agreement, a jury could determine that it was reasonable for Shaver to believe that Walker would honor an oral agreement. The contract required a written amendment only if the change would be *adverse* to the Participant's interest, and Shaver alleges that this one was presented as an amendment that would be beneficial to him.

68. In short, giving Shaver the benefit of reasonable inferences, the Court concludes that he has pleaded justifiable reliance. Whether he can prove it is a matter for another day. *See Stanford v. Owens*, 46 N.C. App. 388, 395 (1980) ("it is generally for the jury to decide whether plaintiff reasonably relied upon representations made by defendant").

69. Accordingly, the Motion with respect to Shaver's claim for negligent misrepresentation shall be **DENIED**.

IV. CONCLUSION

70. WHEREFORE, the Court hereby **ORDERS** as follows:

a. Defendants' Motion as to Shaver's claims for breach of fiduciary and constructive fraud is **GRANTED**, and the claims are hereby **DISMISSED** without prejudice.

b. Defendants' Motion to Dismiss Shaver's remaining claims is **DENIED**.

IT IS SO ORDERED, this the 31st day of March, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases