STATE OF NORTH CAROLINA NEW HANOVER COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 754
KATHY L. SPIVEY and KS TRANSPORTATION, LLC, Plaintiffs, v. DARRYL M. SMITH; INMAN TRUCKING, INC.; INMAN MANAGEMENT, INC.; INMAN TRANSPORTATION, LLC; and DESPARADO, INC., Defendants.	**ORDER AND OPINION ON MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

1. This action arises from a widow's complaint that she has been defrauded by the co-owner of her late husband's trucking business. Kathy Spivey ("Spivey") claims that Darryl Smith ("Smith") set up multiple entities and transferred the business from one entity to the next in a Russian nesting doll-like scheme to winnow the value of the majority interest she inherited from her husband to nothing.

2. The case is before the Court on Defendants' Motion for Partial Judgment on the Pleadings pursuant to Rule 12(c) and Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, (the "Motion") (ECF No. 17).

3. Having considered the Motion, the related briefs, and the arguments of counsel at a hearing on the Motion, the Motion is **GRANTED in part** and **DENIED in part.**

Hall & Green, LLP by John Felix Green and Roseanna C. Horne, for Plaintiffs Kathy L. Spivey and KS Transportation, LLC.

Fitzgerald Hanna & Sullivan by Douglas W. Hanna and Andrew Fitzgerald, for Defendants Darryl M. Smith and Desparado, Inc.

Defendants Inman Trucking, Inc.; Inman Management, Inc.; and Inman Transportation, LLC are unrepresented.

Earp, Judge.

I. FACTUAL BACKGROUND

4. On a motion for judgment on the pleadings, the Court does not find facts but rather recites the facts alleged in the pleadings that are relevant to the Court's determination of the Motion. *See, e.g., Erickson v. Starling*, 235 N.C. 643, 657 (1952); *Langley v. Autocraft, Inc.*, 2023 NCBC LEXIS 95, at **1-2 (N.C. Super. Ct. Aug. 7, 2023).

5. Plaintiff Kathy L. Spivey ("Kathy Spivey" or "Spivey") is a resident of New Hanover County, North Carolina. (Compl. ¶ 1, ECF No. 3.) She is the widow of Thomas Spivey, who died on 7 September 2014. (Compl. ¶¶ 5, 15.)

6. Some forty years ago, Thomas Spivey formed a trucking company in Brunswick County that he named Inman Trucking, Inc. ("Inman Trucking"). (Compl. ¶ 8.) At some point, he employed Smith, the son of a friend, to help him. (Compl. ¶ 9.)

7. Separately, both Kathy Spivey and Smith formed entities through which they own and operate trucks. Kathy Spivey wholly owns KS Transportation, LLC

("KS"). (Compl. ¶ 15.) Smith wholly owns Desparado, Inc. ("Desparado"). (Compl. ¶¶ 7, 20.)

8. In May 1984, while he was still actively running the business, Thomas Spivey formed Inman Management, Inc. ("Inman Management"). (Compl. ¶ 10.)[1] Plaintiffs believe that ownership of the company trucks was, and continues to be, held by Inman Management. (Compl. ¶ 11.)

9. During the last few years of Thomas Spivey's life, he was seriously ill. As his condition declined, Smith increasingly assumed control of the business. (Compl. ¶ 26.)

10. At the time of Thomas Spivey's death in September 2014, Smith was a 25% shareholder in Inman Management. (Compl. ¶ 5.) The remaining 75%, owned by Thomas Spivey, passed through a marital trust to his wife, Kathy Spivey. (Compl. ¶ 5.)

11. Following Thomas Spivey's passing, Smith took complete control of Inman Management. (Compl. ¶ 5.) Kathy Spivey was not actively involved in the business. She was unaware of the particulars of its operations or its finances. (Compl. ¶ 14.) Spivey alleges that she was dependent upon Smith to treat her fairly and to provide truthful information. (Compl. ¶ 15.)

12. But according to Spivey, Smith did just the opposite. She claims that he seized control of the business and implemented a plan to freeze her out and render her ownership interest worthless. (Compl. ¶¶ 16, 21, 29.) In addition, Spivey alleges

[1] Plaintiffs have not alleged what became of Inman Trucking once Inman Management was formed.

that Smith either used the truck she owned without paying KS or sidelined it in order to damage KS. (Compl. ¶ 13.)

13. Spivey alleges that Smith implemented his plan in steps. First, in January 2016, after taking control of Inman Management (in which Spivey was a 75% shareholder), Smith formed Inman Transportation, LLC ("Inman Transportation"). (Compl. ¶¶ 6, 18.) Spivey contends that Smith repeatedly assured her "that she would be treated fairly and would be provided with all material facts of the operation of the business[.]" (Compl. ¶ 18.) Relying on those assurances, Spivey executed the operating agreement for Inman Transportation and agreed to accept a 49% minority ownership interest. Smith, who owned the remaining 51%, became the majority member and manager. (Compl. ¶¶ 6, 18; Mem. Supp. Defs.' Motion, Ex. C ["Operating Agreement"], ECF No. 18.3.)

14. Spivey complains that, unbeknownst to her and without her consent, Smith then transferred business from Inman Management to Inman Transportation. She received no consideration for the transfer. She also believes that Smith sold many of Inman Management's trucks and retained the proceeds for himself. (Compl. ¶¶ 17-19.) Moreover, she alleges that Smith either took the truck she owns through KS out of operation or has used it without paying KS. In either event, KS alleges that it is not receiving revenue for use of the truck, and without an income stream, KS will be forced to sell the truck. (Compl. ¶ 13.)

15. Smith dissolved Inman Management on 30 September 2020. (Compl. ¶ 11.) However, Brunswick County tax records still list Inman Management as the owner of company trucks valued at $3,449,707.00. (Compl. ¶ 11.)

16. More recently, Spivey alleges that Smith has transferred all of Inman Transportation's business either to Desparado, his wholly owned entity, or to some other third party. She alleges that Smith has sold most of the trucks to unknown third parties. (Compl. ¶¶ 20, 24.) Spivey claims these transfers of Inman Transportation's assets occurred without her knowledge or consent and that she received no compensation for them. (Compl. ¶¶ 20-22.) As a result, Spivey contends that her ownership interest in both Inman Management and Inman Transportation "has been rendered worthless." (Compl. ¶ 21.)

17. Furthermore, because Smith has either idled the truck that Spivey owns through KS or has used it without paying her, KS alleges that Smith's actions have damaged it as well. (Compl. ¶¶ 21-22.)

18. After her husband passed away, Kathy Spivey's health declined to the point where she came close to death herself. She underwent open heart surgery in 2019 and is presently bed-ridden. (Compl. ¶ 31.) Spivey asserts that the combination of her lack of knowledge about the business, her grief over her husband's death, and her own serious disability rendered her unable to participate in the business and made her particularly dependent on Smith and vulnerable to his wrongdoing. (Compl. ¶ 31.)

19. Spivey further alleges that Smith concealed information that was necessary for her to make important business decisions and that she was incapable of effectively resisting his actions. She complains that Smith knew she was fragile and took advantage of her condition to benefit himself. (Compl. ¶ 31.)

II. PROCEDURAL HISTORY

20. Plaintiffs filed their Complaint, Motion for Temporary Restraining Order, Motion for Preliminary Injunction, and Request for Permanent Injunction and Affidavit on 6 March 2023. (*See generally* Compl.) The Complaint asserts claims against all defendants for breach of fiduciary duty (oppression of a minority shareholder and member) and fraud, and Plaintiffs seek the imposition of a constructive trust, an accounting, injunctive relief, and damages.

21. On 6 March 2023, the Honorable John W. Smith entered a temporary restraining order ("TRO") directing Defendants not to destroy, conceal, dispose of, or alter in any fashion the business and banking records of Inman Trucking, Inman Management, and Inman Transportation. (TRO, ECF No. 5.) With the agreement of the parties, on 16 March 2023, the TRO was indefinitely extended until either party requested a hearing on Plaintiffs' request for a preliminary injunction.[2] (Order, ECF No. 41.)

---

[2] Subsequently, at Smith's request, on 8 August 2023, the Court entered a briefing order, and a hearing on Plaintiffs' Motion for Preliminary Injunction has been set for 6 October 2023. (ECF No. 43.)

22. The matter was designated to the North Carolina Business Court and assigned to the undersigned on 17 March 2023. (ECF Nos. 1, 2.)

23. On 17 April 2023, Plaintiffs filed a Motion for Entry of Default against Inman Trucking, Inman Management, and Inman Transportation resulting from their failure to respond to the Complaint. (ECF No. 9.)

24. Subsequently, on 8 June 2023, Defendants filed this Motion seeking to dismiss Plaintiffs' claims for breach of fiduciary duty, fraud, and constructive trust. The Motion was fully briefed, and on 8 August 2023, the Court convened a hearing on the Motion, during which all parties were present. (*See* ECF No. 21.) The Motion is now ripe for disposition.

III. LEGAL STANDARD

25. The Court reviews a Rule 12(c) motion as it does a motion to dismiss pursuant to Rule 12(b)(6). *Azko Nobel Coatings Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **19 (N.C. Super. Ct. Nov. 3, 2011). Accordingly, the Court views the factual allegations and permissible inferences in the light most favorable to the nonmoving party:

> [a]ll well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137 (1974) (citations omitted).

26. When ruling on the Motion, the Court may consider documents that are the subject of the complaint and to which the complaint specifically refers—even if

they are presented by Defendants—without converting the motion to one for summary judgment. *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204 (2007) (quoting *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001)). The Court may reject allegations contradicted by those documents. *Laster v. Francis*, 199 N.C. App. 572, 577 (2009). Moreover, the Court need not 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 & Hum. Servs.*, 174 N.C. App. 266, 274 (2005) (citation omitted).

27. Rule 12(c) functions "to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale*, 286 N.C. at 137. However, a Rule 12(c) motion "should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Carpenter v. Carpenter*, 189 N.C. App. 755, 761 (2008) (citation omitted). "A judgment on the pleadings is not appropriate merely because the claimant's case is weak and he is unlikely to prevail on the merits." *Huss v. Huss*, 31 N.C. App. 463, 469 (1976).

28. As for Defendants' Rule 12(b)(1) basis for dismissal, it is well-established that "[s]tanding 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). To have standing, a party must have "a 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).

IV. ANALYSIS

A. Breach of Fiduciary Duty

29. Both Plaintiffs assert a breach of fiduciary duty claim against each Defendant. (Compl. ¶¶ 25-33.) However, there are no allegations suggesting that Inman Trucking, Inman Management, or Inman Transportation owed a fiduciary duty to KS. The Motion shall be GRANTED as to those entities.

30. As for Spivey, it is black letter law that a corporation, which acts through its directors and officers, does not owe fiduciary duties to its shareholders. *See, e.g., Oliver v. Brown & Morrison, Ltd.,* 2022 NCBC LEXIS 20, at **28 (N.C. Super. Ct. March 3, 2022) ("[A] corporation does not owe generalized fiduciary duties to its shareholders."); *Barefoot v. Barefoot*, 2022 NCBC LEXIS 8, at **23 (N.C. Super. Ct. Feb. 2, 2022) ("[D]irectors generally owe fiduciary duties to the corporation rather than to the individual shareholders[.]"); *Joalpe-Industria de Expositores, SA v. Alves*, 2015 NCBC LEXIS 11, at *29-30 (N.C. Super. Ct. Jan. 27, 2015) ("Directors of a corporation have a fiduciary duty to act in good faith, with the care that a prudent person would ordinarily act in that position, and in a manner that the director reasonably believes to be in the best interest of the corporation. This duty, however, is owed to the corporation itself, and not to individual shareholders.").

31. Likewise, the manager and officers of a limited liability company do not owe fiduciary duties to its members. *See, e.g, Mary Annette, LLC v. Crider*, 2023 NCBC LEXIS 28, at *10-11 (N.C. Super. Ct. Feb. 23, 2023) ("Generally, members of an LLC don't owe fiduciary duties to each other or to the company, and managers and

officers owe fiduciary duties to the company but not to the members." (citing *Kaplan v. O.K. Techs., LLC*, 196 N.C. App. 469, 472-74 (2009))).

32. Accordingly, as to Inman Trucking, Inman Management, and Inman Transportation, the Motion for Judgment on the Pleadings as to Spivey shall also be GRANTED.[3]

a. Claims for Damage to Spivey's Interest in Inman Management

33. As for Spivey's breach of fiduciary duty claim against Smith and Desparado for damage to her interest in Inman Management, each argues that no fiduciary duties to Spivey exist. Smith contends that, as a minority shareholder, he does not owe fiduciary duties to Spivey, the majority shareholder. (Mem. Supp. Defs.' Motion ["Defs.' Mem. Supp."] p. 9, ECF No. 18.) Additionally, as a separate entity in which Spivey has no ownership interest, Desparado argues that it has no fiduciary responsibility to her. (Defs. Mem. Supp. p. 5-6.) The Court first addresses Smith's argument. Desparado's argument is addressed in subpart c, below.

34. "To state a claim for breach of fiduciary duty, Plaintiff must plead the existence of a fiduciary duty, a breach of that duty, and injury proximately caused by the breach." *Langley*, 2023 NCBC LEXIS 95, at **9 (citing *Green v. Freeman*, 367 N.C. 136, 141 (2013)). Where there is no fiduciary duty, there can be no claim for its breach. *See Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240,

[3] The failure of Inman Trucking, Inman Management, and Inman Transportation to respond to the Complaint necessarily requires the entry of default against each of them. However, the Court, in its discretion, finds good cause to set aside entry of default as to these Defendants given that it has dismissed the claims attempted against them. *See* N.C. R. Civ. P. 55(a), (d).

247 (2002) ("A claim for breach of fiduciary duty requires the existence of a fiduciary duty.").

35. A fiduciary relationship is one in which "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." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52 (2016). "[I]t extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other." Dalton v. Camp*, 353 N.C. 647, 651-52 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598 (1931)).

36. "As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation." *Freese v. Smith*, 110 N.C. App. 28, 37 (1993) (citing Russell M. Robinson, II, *North Carolina Corporation Law*, § 11.4 (1990)). However, regardless of their relative ownership interests[4], a *de facto* fiduciary duty could arise as a result of Smith's alleged dominance over Spivey at a time when she was in a weakened condition. *See Abbitt*, 201 N.C. at 598 ("The relation and the duties involved in [the fiduciary relationship] need not be legal; it may be moral, social, domestic, or merely personal.").

---

[4] It is true, as Spivey argues, that the North Carolina Supreme Court has left open the possibility that a minority, but controlling shareholder, could owe a fiduciary duty to other shareholders if the controlling shareholder "exercises such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control." *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 616-17 (2018) (quoting *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 993 (Del. Ch. 2014)). Given its holding, the Court finds it unnecessary to determine whether Smith is also a controlling minority shareholder.

37. Still, "[t]he standard for finding a *de facto* fiduciary relationship is a demanding one: 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. S. River Elec. Mbrshp. Corp.*, 250 N.C. App. 631, 636 (2016). Mere influence over another's affairs is insufficient. *See id.; Hartsell v. Mindpath Care Ctrs.*, 2022 NCBC LEXIS 130, at **11 (N.C. Super. Ct. Nov. 2, 2022).

38. Here, there is no question that Smith, who allegedly owns 25% of Inman Management, is the minority shareholder, and Spivey, who allegedly owns 75%, is the majority shareholder. Even so, contrary to his argument, Smith's status as a minority shareholder does not preclude the possibility that he owes fiduciary duties to Spivey. The question is whether Spivey has sufficiently pled that Smith "held all the cards."

39. Spivey alleges that Smith is aware that Spivey has been largely incapacitated since her husband's death due to her own serious health condition. Spivey asserts that she was in a "vulnerable position" and "dependent" on Smith who "seized and exercised more and more control" over Inman Management to the exclusion of Spivey. She alleges that Smith so "dominated the business affairs" of Inman Management that he was able to conceal material information from her and ultimately to transfer Inman Management's business to Inman Transportation without her consent. (Compl. ¶¶ 5, 15, 16, 18, 27, 31.)

40. Assuming the truth of these allegations, as is required at this stage, the Court cannot say that "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." *Ness v. Jones*, 89 N.C. App. 504, 505 (1988). *See Curl v. Key*, 311 N.C. 259 (1984) (fiduciary relationship existed when 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) (fiduciary relationship existed when 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) (*de facto* fiduciary duty existed when 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").

41. Accordingly, as to Spivey's breach of fiduciary duty claim against Smith for actions he allegedly took that impacted her as a shareholder in Inman Management, the Motion shall be DENIED.

b. Claims for Harm to Spivey's Interest in Inman Transportation

42. Spivey also asserts that Smith breached his fiduciary duties to her as a member of Inman Transportation. This time, Spivey pleads that she is the minority interest holder owning 49% of Inman Transportation, while Smith owns 51%. (Compl. ¶ 6.)

43. As this Court has stated, generally "members of an LLC do not owe a fiduciary duty to one another, but in some circumstances, 'a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members.' " *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *16 (N.C. Super. Ct. June 19, 2019) (quoting *Fiske v. Kieffer*, 2016 NCBC LEXIS 22, at *9 (N.C. Super. Ct. Mar. 9, 2016)); *see also Kaplan*, 196 N.C. App. at 473. Of course, the members of an LLC are free to contract differently and may impose or eliminate fiduciary duties for members and managers. *See, e.g., Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 80, at **36 (N.C. Super. Ct. Oct. 21, 2016) (discussing elimination of fiduciary duties by provision in operating agreement).

44. There is no question that Spivey has alleged that Smith is in control of Inman Transportation. Not only does he hold the majority interest for voting purposes, but also he is the manager, vested by the operating agreement with "full and complete authority, power and discretion to manage and control the business of the Company[.]" (Operating Agreement §§ 3.1–3.2.)

45. Further, a review of Inman Transportation's operating agreement does not support Smith's argument that any fiduciary duties that might have arisen with

respect to Spivey have been eliminated. Section 3.6 limits liability to the company, but it does not speak to the liability of the manager to Inman Transportation's minority member. (Operating Agreement § 3.6.)

46. Accordingly, as to Spivey's breach of fiduciary duty claim against Smith for actions he allegedly took that impacted her as a member of Inman Transportation, the Motion shall be DENIED.

c. Reverse Piercing and Desparado.

47. Spivey also asserts a claim for breach of fiduciary duty against Defendant Desparado. Desparado responds that it has no fiduciary relationship with Spivey. (Defs.' Mem. Supp. pp. 5-6.) However, Spivey alleges that Smith used Desparado, his wholly owned corporation, to siphon off Inman Transportation's business without her knowledge or consent, and without providing her any financial benefit. (Compl. ¶¶ 20-22.) She contends, therefore, that she should be able to pierce the corporate veil and hold Desparado responsible for Smith's breach of fiduciary duty.

48. "To pierce the corporate veil is to set aside the corporate form and the protections that go along with it." *Harris v. Ten Oaks Mgmt.*, 2022 NCBC LEXIS 62, at **5 (N.C. Super. Ct. June 20, 2022). "[V]eil piercing allows a plaintiff to impose legal liability for a corporation's obligations . . . upon some other company or individual that controls and dominates a corporation." *Id.* (quoting *Green*, 367 N.C. at 145).

49. Spivey has asserted the less common form of veil piercing known as reverse piercing. *See Gurkin v. Sofield*, 2020 NCBC LEXIS 49, at *22-24 (N.C. Super. Ct. Apr. 15, 2020) (explaining the doctrine of reverse veil piercing, under which an entity can be held personally liable for its majority owner's actions). She seeks to impose liability on a company (Desparado) for the acts of its owner (Smith), rather than the other way around. *See, e.g., Fischer Inv. Cap., Inc. v. Catawba Dev. Corp.*, 200 N.C. App. 664, 650 (2009) ("[W]here one entity is the alter-ego, or mere instrumentality, of another entity, shareholder, or officer, the corporate veil may be pierced to treat the two entities as one and the same, so that one cannot hide behind the other to avoid liability.").

50. To plead reverse piercing, a plaintiff "must, at a minimum, begin by pleading the same elements that are necessary to establish traditional piercing." *Harris*, 2022 NCBC LEXIS 62, at **6. A party must show "that the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State." *Cold Springs Ventures, LLC v. Gilead Scis., Inc.*, 2015 NCBC LEXIS 1, at *15-16 (N.C. Super. Ct. Jan. 6, 2015) (quoting *Green*, 367 N.C. at 145).

51. The Court looks for three elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at *16 (internal citations omitted).

52. But pleading control in a conclusory fashion is insufficient. Spivey must allege facts to support that conclusion. Specifically, courts look for allegations of "inadequate capitalization, noncompliance with corporate formalities, lack of a separate corporate identity, excessive fragmentation, siphoning of funds by the dominant shareholder, nonfunctioning officers and directors, and absence of corporate records." *Gurkin*, 2020 NCBC LEXIS 49, at *24-25 (citing *Green*, 367 N.C. at 145). "[T]he presence or absence of any particular factor . . . is [not] determinative. Rather, it is a combination of factors which . . . suggest that the corporate entity attacked had no separate mind, will or existence of its own and was therefore the mere instrumentality or tool of the dominant corporation." *Fischer Inv. Cap., Inc.*, 200 N.C. App. at 651 (cleaned up).

53. Spivey has pled that Smith is the owner of 100% of the issued and outstanding shares of stock in Desparado, (Compl. ¶ 7), and that Smith is in complete control of Desparado, (Compl ¶ 29). She has also pled that Smith fraudulently concealed material facts, (Compl. ¶ 36). However, Spivey fails to allege any of the factors North Carolina courts consider when determining whether a party has enough control to pierce the corporate veil. Conclusory allegations that Smith controlled Desparado, standing alone, are not enough. *Gurkin*, 2020 NCBC LEXIS 49, at *25. As the Supreme Court aptly stated, piercing the corporate veil "is a strong step:

Like lightning, it is rare and severe." *State ex rel. Cooper v. Ridgeway Brands Mfg.,* 362 N.C. 431, 439 (2008). *See also Harris*, 2022 NCBC LEXIS 62, at **10 (holding that plaintiff failed to allege facts to support "such an extraordinary equitable remedy"); *cf. Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 406 (2000) (allowing claim against "inextricably wedded" business entities alleged to be under the control of some or all of the defendants or had entered into a conspiracy with them).

54. For this reason, the Court concludes that Desparado's Motion shall be GRANTED, without prejudice. Spivey's current allegations are simply insufficient to support a reverse piercing theory, and there are no direct allegations of wrongdoing on Desparado's part.[5]

B. Fraud

55. Smith and Desparado contend that they are entitled to judgment on Plaintiffs' fraud claims because Spivey's pleading does not meet the heightened pleading requirements of Rule 9(b). (Defs.' Mem. Supp. p. 11.)

56. The elements of a claim for fraud are a "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, and (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Johnston v. Pyka*, 283 N.C. App. 183, 197 (2022).

[5] Nothing herein prejudices Spivey's ability to move to amend the complaint should she develop facts that would permit her to allege a veil piercing theory, and particularly if Smith denies liability because he attributes certain conduct to Desparado.

57. Rule 9(b) requires the plaintiff to state all averments of fraud "with particularity." N.C. R. Civ. P. 9(b). The rule requires a plaintiff who pleads fraud to identify the "time, place, and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent act or representations." *BOGNC, LLC v. Cornelius NC Self-Storage, LLC*, 2012 NCBC LEXIS 23, at **12 (N.C. Super. Ct. Apr. 25, 2012) (quoting *Terry v. Terry*, 302 N.C. 77, 85 (1981)). *See Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 2023 N.C. LEXIS 585, at *18 (N.C. Supreme Ct. Sept. 1, 2023) (affirming dismissal of fraud claim for failure to satisfy Rule 9(b) pleading requirements).

58. Additionally, "[t]he alleged misrepresentations must also be . . . more than mere puffing, guesses, or assertions of opinions but actual representations of material facts." *Hart v. First Oak Wealth Mgmt., LLC*, 2022 NCBC LEXIS 81, at **44 (N.C. Super. Ct. July 28, 2022) (quoting *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992) (internal quotation marks omitted)); *Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *75 (N.C. Super. Ct. Dec. 31, 2019) ("The alleged misrepresentations must also be definite and specific[.]" (internal quotation marks and citations omitted)).

59. To the extent Plaintiffs attempt a claim for affirmative fraud, they fail to meet this standard. Plaintiffs' allegations are limited to an "assurance" or "indication" from Smith that he "would treat [Spivey] fairly and the business would continue with her and Plaintiff KS receiving the funds which they were due." (Compl. ¶ 35.) A vague assurance of this nature is not a definite, specific misrepresentation

of a material fact and, while the "indications" are attributed to Smith, the time and place that they occurred appear nowhere in the pleadings.

60. For these reasons, the Motion shall be GRANTED with respect to any claim for affirmative fraud.

61. As for fraudulent concealment, however, the requirements are different:

> In order to comply with the pleading requirements of Rule 9(b) with respect to fraud by omission, a plaintiff usually will be required to allege the following with reasonable particularity: (1) the relationship or situation giving rise to the duty to speak, (2) the event or events triggering the duty to speak, and/or the general time period over which the relationship arose and the fraudulent conduct occurred, (3) the general content of the information that was withheld and the reason for its materiality, (4) the identity of those under a duty who failed to make such disclosures, (5) what those defendant(s) gained by withholding information, (6) why plaintiff's reliance on the omission was both reasonable and detrimental, and (7) the damages proximately flowing from such reliance.

Breeden v. Richmond Cmty. Coll., 17 F.R.D. 189, 195 (M.D.N.C. 1997) (adopted by *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at **9 (N.C. Super. Ct. June 18, 2007)).

62. This Court has recognized that "fraudulent concealment or fraud by omission is, by its very nature, difficult to plead with particularity." *Lawrence*, 2007 NCBC LEXIS 20, at **9 (quoting *Breeden*, 171 F.R.D. at 195).

63. First, Plaintiff must identify a duty to disclose. Such a duty arises when:

> (1) a fiduciary relationship exists between the parties to the transaction; (2) a party has taken affirmative steps to conceal material facts from the other; or (3) one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence.

Herrera v. Charlotte Sch. of L., LLC, 2018 NCBC LEXIS 35, at *38-39 (N.C. Super. Ct. Apr. 20, 2018) (quoting *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696 (2009)).

64. The Court has found that Spivey has sufficiently alleged that Smith owed her fiduciary duties. A fiduciary relationship gives rise to a duty to disclose. *See, e.g., Harton v. Harton*, 81 N.C. App. 295, 297 (1986).

65. The second, third, fourth, and fifth elements require Plaintiff to plead with particularity the general time period over which the relationship arose and the fraudulent conduct occurred, the general content of the information withheld and the reason for its materiality, the identity of the defendant who failed to make disclosures, and what the defendant gained by withholding information. *Breeden*, 171 F.R.D. at 195. Spivey alleges that Smith began concealing information from her at least by 15 January 2016, when Inman Transportation was organized, and that the concealment resulted in the transfer of business from Inman Management to Inman Transportation. (Compl. ¶ 17.) She alleges that more recently Smith has transferred business from Inman Transportation to Desparado. (Compl ¶ 20.) Spivey claims that Smith engaged in this wrongdoing to devalue her interest in the trucking business and so that he would personally profit. (Compl. ¶ 36.) These allegations are sufficiently particular to meet Spivey's pleading requirements and to allow Smith to address the claim. *Breeden*, 171 F.R.D. at 196.

66. Smith focuses on the sixth *Breeden* element, which requires Spivey to plead with particularity "why [her] reliance on the omission was both reasonable and detrimental[.]" *Id.* at 195. *See, e.g., Lawrence*, 2007 NCBC LEXIS 20, at **9

(emphasizing that reasonable and detrimental reliance must be pled with particularity). He argues that, as a member of Inman Transportation, Spivey had information rights that she could have exercised and her failure to do so dooms her claim. (Defs.' Mem. Supp. p. 12-13.)

67. But Spivey contends that information was purposefully kept from her by Smith, a person she trusted as a fiduciary. She claims that her illness made her "incapable of effectively resisting and countering [Smith's] actions[.]" (Compl. ¶ 31.) She further alleges that she believes Smith has destroyed business records that would have revealed "this financial misdealing." (Compl. ¶ 23.)

68. Where a plaintiff alleges that information was purposefully kept from her by her fiduciary, rather than by a defendant in an arms-length transaction, the allegation that she detrimentally relied on her fiduciary is sufficient to satisfy Rule 9(b) at the pleadings stage. *Compare BDM Invs. v. Lenhil, Inc.*, 2012 NCBC LEXIS 7, at **59-60 (N.C. Super. Ct. Jan. 18, 2012) (Plaintiffs may be excused from showing reasonable reliance where the claims arise from fiduciary relationships) *and Small v. Dorsett*, 223 N.C. 754, 761 (1944) ("Where a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused."), *with Olivetti Corp. v. Ames Bus. Sys., Inc.,* 319 N.C. 534, 543 (1987) ("When the parties deal at arms length and [one party] has full opportunity to make inquiry but neglects to do so and the [other party] resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie." (quoting *Calloway v. Wyatt,* 246 N.C. 129, 134 (1957))).

69. Additionally, Spivey alleges that she believes that records have been destroyed to conceal the truth. (Compl. ¶ 23.) Therefore, even if Smith does not owe her fiduciary duties, she alleges that his conduct has effectively prevented her from determining the truth. *See Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *25 (Dec. 22, 2021) (holding that "[w]hile reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence but failed to investigate," Plaintiffs have alleged that Defendants' conduct prevented them from discovering the alleged fraud (citing *Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *110 (N.C. Super. Ct. Dec. 31, 2019))); *Flanders/Precisionaire Corp. v. Bank of N.Y. Mellon Trust Co.*, 2015 NCBC LEXIS 36, at *36 (Apr. 7, 2015) (holding that the plaintiff's allegations that it "was not privy to the information which would have allowed it to understand the nature of the Loan transaction" and would not have entered the transaction had it known the true facts were sufficient to satisfy Rule 9(b)).

70. As for KS' claim against Smith for fraudulent concealment, the Complaint fails at *Breeden*'s first step. There are no allegations that would give rise to a duty to disclose. In fact, there are very few allegations in the Complaint that speak to the nature of any legal responsibility to KS. KS complains that "at least one truck is still owned by Plaintiff KS but due to the actions of Defendant Smith . . . the truck is not in service or operating and no funds are being paid to . . . KS resulting in the necessity of sale of the truck by Plaintiff KS." (Compl. ¶ 13.) While this allegation suggests that KS has been damaged, fraudulent concealment is not alleged.

71. Accordingly, the Court DENIES the Motion with respect to Spivey's claim against Smith for fraudulent concealment, but the Motion with respect to KS' claim for fraudulent concealment shall be GRANTED.

C. Statute of Limitations

72. Defendants contend that Spivey's claims for breach of fiduciary duty and fraud are time-barred because they arose when she signed the operating agreement for Inman Transportation on 15 January 2016, and the action was not commenced until March 2023. (Defs.' Mem. Supp. pp. 7-8.)

73. Spivey responds that it has only been within the three years prior to filing this action that she became aware that Smith was selling trucks without accounting for the proceeds and using Inman Transportation, and now Desparado, to deprive her of her ownership interest in the business. (Mem. Opp. Defs.' Motion ["Pls.' Mem. Opp."], p. 17 ECF No. 19.)

74. Claims for fraud and breach of fiduciary duty are subject to a three-year statute of limitations that begins when the claims accrue. *See BDM Invs.*, 2012 NCBC LEXIS 7, at **36 (statute of limitations for claims of fraud is three years) (citing N.C.G.S. § 1-52(9)); *Loray Mill Devs., LLC v. Camden Loray Mill Phase 1, LLC*, 2023 NCBS LEXIS 21, at **31 (N.C. Super. Ct. Feb. 7, 2023) (claims for breach of fiduciary duty are subject to a three-year statute of limitations (citing N.C.G.S. §§ 1-52(1), (5), (9))).

75. A claim generally accrues, and the statute of limitations begins to run, when the right to institute and maintain suit arises. *See Ocean Hill Joint Venture v.*

N.C. Dep't of Env't, Health & Nat. Res., 333 N.C. 318, 323 (1993). If the discovery rule applies, however, a claim will not accrue until the plaintiff knows or should have known that his rights have been violated. *See Chisum v. Campagna*, 376 N.C. 680, 701 (2021) (under the discovery rule, the limitations period begins at the time the plaintiff knew or should have known of the breach).

76. Fraud claims are subject to the discovery rule. *See, e.g., Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 2015 NCBC LEXIS 64, at **18 (N.C. Super. Ct. June 19, 2015), *aff'd*, 370 N.C. 1 (2017) ("The statute of limitations governing a fraud claim is three years and begins to run from the time the claimant should have discovered the facts constituting the fraud." (citing N.C.G.S. § 1-52(9))).

77. Breach of fiduciary duty claims are also subject to the discovery rule. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 68-69 (2005) (discovery rule applies to claims for breach of fiduciary duty).

78. In general, determining when a plaintiff discovered or should have discovered that he or she has been wronged is a question of fact to be answered by the jury. *See Forbis v. Neal*, 361 N.C. 519, 524 (2007) (noting that "a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances"). However, "where all material allegations of fact are admitted in the pleadings and only questions of law remain," judgment on the pleadings may be properly entered. *Aetna Cas. and Sur. Co. v. Anders*, 116 N.C. App. 348, 349 (1994).

79. Here, Spivey alleges that Defendants' wrongful actions occurred without her knowledge and were concealed from her. (Compl. ¶¶ 17, 19, 20, 31, 36-38, 40.)

At paragraph 19 of the Complaint she alleges: "[o]ver a period of time, the exact parameters of which are not known to Plaintiff Kathy at this time, the business of Defendant [Inman] Management was 'transferred' by Defendant Smith to Defendant [Inman] Transportation without any consideration being paid therefore to Plaintiff Kathy and without her consent." (Compl. ¶ 19.) Similarly, at paragraph 36 she alleges: "Defendant Smith, acting individually and through the defendant entities . . . concealed material facts from the Plaintiffs over a period of years[.]"

80. While she was certainly aware that she signed the operating agreement for Inman Transportation in January 2016, Spivey contends that there was no disclosure, accounting, or report of any kind that would have put her on notice that Smith was systemically using Inman Transportation to devalue her interest and to benefit himself. (Compl. ¶¶ 36-38.) Thus, determining when Spivey, in the exercise of reasonable care and due diligence, should have discovered the conduct giving rise to her claims is not one that can be resolved at this juncture. *See Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486 (2004) ("[D]etermining when [the] plaintiff should, in the exercise of reasonable care and due diligence, have discovered the [alleged] fraud is a question of fact to be resolved by the jury.").

81. Furthermore, Spivey has alleged a claim for constructive fraud even though she did not label it as such. *See Marzec v. Nye*, 203 N.C. App. 88, 91 (2010) (observing that a claim may be stated even if not "properly labeled"). To survive this Motion, a cause of action for constructive fraud must allege "(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order

to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294 (2004).

82. The Court has determined that Spivey has adequately pled that Smith owed her fiduciary duties. She alleges that Smith seized control of the business and used that control for his personal advantage and profit. (Compl. ¶¶ 16-18, 26, 31, 36.) She asserts that she was injured as a result. (Compl. ¶¶ 13, 16, 21-22, 29, 31, 37, 39.) Accordingly, Plaintiff has sufficiently pled a claim for constructive fraud, which is subject to a ten-year statute of limitations. N.C.G.S. § 1-56. Given that Thomas Spivey did not pass away until September 2014, Kathy Spivey's claim alleging damage to the ownership interest she inherited is well within the ten-year statute of limitations.

D. <u>Standing</u>

1. **Direct v. Derivative Action**

83. In his brief, Smith argues that the claims attempted are derivative and, therefore, Spivey lacks standing to sue directly.[6] (Defs.' Mem. Supp. pp. 9-11.) Generally, "shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658 (1997). Instead, their recourse is to bring a derivative action on behalf of

[6] During the hearing, Counsel for Smith and Desparado appeared to concede that Spivey could bring direct claims. As our Court of Appeals has observed, "[i]t is not always easy to distinguish between a right of the corporation and a right belonging to an individual shareholder. 'The same wrongful conduct can give rise to both[.]' " *Norman*, 140 N.C. App at 395 (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporations Law* § 17-2(a) at 333 (5th ed. 1995)).

the entity. However, there are two exceptions that permit a shareholder to sue directly: "(1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders." *Id.* This rule applies not only in the context of claims involving a corporation but also to claims involving an LLC. *See Norment v. Rabon*, 2022 NCBC LEXIS 73, at **16-17 (N.C. Super. Ct. July 7, 2022).

84. The Court concludes for the reasons stated herein that Spivey has met the first *Barger* exception by sufficiently alleging that Smith owed her fiduciary duties. Therefore, to the extent Spivey's injuries are based on her breach of fiduciary duty claim, she may bring a direct claim against Smith, even if Inman Management or Inman Transportation was also harmed.

85. In addition, "[a]n injury is peculiar or personal to the shareholder if a legal basis exists to support [the] plaintiff's allegations of an individual loss, separate and distinct from any damage suffered by the corporation." *Barger*, 346 N.C. at 659 (internal quotation marks omitted). Spivey alleges that she was the victim of fraud. Her damages are distinct from, and in addition to, the injury sustained by either Inman Management or Inman Transportation. Consequently, with respect to her fraud claim, Spivey satisfies the second *Barger* exception and may bring a direct claim. *Id.*

2. **Marital Trust**

86. Defendants contend that because Spivey's shares of Inman Management were held in a marital trust after her husband's death, the only party who has standing to sue for harm to Inman Management is the trustee. Referencing various stock certificates, they argue that Kathy Spivey's claim is misdirected and that her only recourse would be to sue the trustee, not Smith. (Defs.' Mem. Supp. pp. 9-11.) Spivey responds that, as the beneficiary of the trust, she has always been the real party in interest. (Pls.' Mem. Opp. pp. 11-12.)

87. The North Carolina Rules of Civil Procedure provide that "[e]very claim shall be prosecuted in the name of the real party in interest[.]" N.C.R. Civ. P. 17(a). "A real party in interest is a party who is benefited or injured by the judgment in the case and who by substantive law has the legal right to enforce the claim in question." *Slaughter v. Swicegood*, 162 N.C. App. 457, 463 (2004) (quoting *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 249 (1984)) (cleaned up).

88. The Court first observes that Defendants' reliance on stock certificates that were neither referenced nor attached to the pleadings is not appropriate at this stage. "A judgment on the pleadings is a method by which a trial court may dispose of a claim when it is evident from the face of the pleadings that the claim lacks merit." *China Grove 152, LLC v. Town of China Grove*, 242 N.C. App. 1, 5 (2015) (quoting *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 600 (2001).[7]

[7] The Court distinguishes its ability to consider Inman Transportation's operating agreement, which is specifically referenced in the Complaint, from its inability to consider the stock certificates, which are not mentioned in the Complaint. *See Oberlin*, 147 N.C. App. at 60.

89. Looking only at the pleadings, Spivey alleges upon information and belief that, as to Inman Management, she "was a majority owner by virtue of a marital trust executed by her husband, Thomas Caddell Spivey, who at the time of his death was owner of 75% of the issued and outstanding shares of stock and Defendant Smith owned 25%." (Compl. ¶ 5.) Nowhere does she allege that a third-party trustee controlled her interest at any time, much less at the time when her causes of action accrued. Because Spivey has adequately pled that she has standing to sue, the motion to dismiss for lack of subject matter jurisdiction shall be DENIED.

C. Constructive Trust

90. Finally, Defendants move to dismiss Spivey's claim for a constructive trust because a constructive trust is a remedy, not a claim. The Court agrees. As the Supreme Court has explained,

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 211 (1970). "[T]he imposition of a constructive trust is a remedy, not a standalone claim." *Barefoot*, 2022 NCBC LEXIS 8, at **33; c*f. Cury v. Mitchell*, 202 N.C. App. 558, 562 (2010) (holding that constructive trust is a remedy for a successful breach of fiduciary duty claim). Accordingly, Defendants' Motion for Judgment on the Pleadings with respect to a claim for constructive trust shall be GRANTED, but the Court's ruling is without

prejudice to Spivey's right to pursue the constructive trust remedy to the extent that one or more claims justify it.

V. CONCLUSION

91. WHEREFORE, for the reasons stated herein, Defendants' Motion for Partial Judgment on the Pleadings is **GRANTED in part** and **DENIED in part** as follows:

a. As to Plaintiffs' claims against Inman Trucking, Inc., Inman Management, Inc., Inman Transportation, LLC, and Desparado, Inc., the Motion is **GRANTED**, and these claims are dismissed without prejudice;

b. As to Plaintiffs' claim for affirmative fraud, the Motion is **GRANTED**, and this claim is dismissed without prejudice;

c. As to KS Transportation, LLC's claims for breach of fiduciary duty or fraudulent concealment, the Motion is **GRANTED**, and this claim is dismissed without prejudice;

d. As to Plaintiffs' constructive trust "claim," the Motion is **GRANTED**, and the claim is dismissed without prejudice to Plaintiffs' ability to seek such a remedy should a claim support it;

d. In all other respects, Defendants' Motion for Judgment on the Pleadings is **DENIED**.

SO ORDERED, this the 18th day of September, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases