

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV019127-910

SAHIL KUMAR; TRUGREEN
GLOBAL RECYCLING, LLC; and
TRUE GREEN RECYCLING, LLC,

Plaintiffs,

v.

PRIYANKA PATEL and EMPOWER
TOMORROW, INC.,

Defendants.

**ORDER AND OPINION ON MOTIONS
TO DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

1. **THIS MATTER** is before the Court on the 27 October 2023 filing of *Empower Tomorrow, Inc.'s Motion to Dismiss First Amended Complaint* (“Empower Tomorrow’s Motion”), (ECF No. 18 [“Empower Tomorrow Mot.”]), and the 30 October 2023 filing of Defendant Priyanka Patel’s *Motion to Dismiss under N.C. Rules 12(b)(1) and 12(b)(6)* (“Patel’s Motion”; with Empower Tomorrow’s Motion, the “Motions”), (ECF No. 20 [“Patel Mot.”]). Pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure (the “Rule(s)”), the Motions request dismissal of nearly all claims alleged in Plaintiffs’ First Amended Complaint (the “Amended Complaint”). (Empower Tomorrow Mot.; Patel Mot.; *see* Pls.’ First Am. Compl., ECF No. 11 [“Am. Compl.”].)

2. For the reasons set forth herein, the Court **GRANTS** the Motions.

Dement Askew, LLP, by Jonathan Martin and James Johnson, for Plaintiffs.

Vann Attorneys, PLLC, by Ian Richardson and Jon D. Hensarling, for Defendant Priyanka Patel.

*Stevens Martin Vaughn & Tadych, PLLC, by K. Matthew Vaughn, for
Defendant Empower Tomorrow, Inc.*

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of Plaintiff Sahil Kumar (“Mr. Kumar”) and Defendant Priyanka Patel’s (“Ms. Patel”) formation of Defendant Empower Tomorrow, Inc. (“Empower Tomorrow”), a North Carolina nonprofit corporation, and the events that followed its formation. Simply put, Plaintiffs contend that they provided the nonprofit with funds to assist Empower Tomorrow with startup costs, with the purported understanding that those funds would be repaid once the nonprofit was able to support itself. At issue in this case is whether the funds provided are loans that are ripe for repayment, and among other things, whether Mr. Kumar is owed back pay for his work at the nonprofit between 2019 and 2023.

II. FACTUAL AND PROCEDURAL BACKGROUND

4. The Court does not make determinations of fact on motions to dismiss under Rule 12(b)(6), instead reciting the factual allegations of the Amended Complaint that are relevant and necessary to the Court’s determination of the Motions. *Gateway Mgmt. Servs. v. Carrbridge Berkshire Grp., Inc.*, 2018 NCBC LEXIS 45, at *9 (N.C. Super. Ct. May 9, 2018).

A. The Parties

5. Mr. Kumar is a resident of Wake County, North Carolina. (Am. Compl. ¶ 1.)

6. Plaintiffs TruGreen Global Recycling, LLC (“TruGreen Global”) and True Green Recycling, LLC (“True Green Recycling”; with Mr. Kumar and TruGreen Global, “Plaintiffs”) are North Carolina limited liability companies with their principal place of business in Raleigh, North Carolina. (Am. Compl. ¶¶ 2–3.) Mr. Kumar is the owner and president of both companies. (Am. Compl. ¶¶ 2–3.) TruGreen Global and True Green Recycling purchase cell phones at auction and repair them for resale on eBay. (Am. Compl. ¶ 14.)

7. Ms. Patel is a resident of Wake County, North Carolina. (Am. Compl. ¶ 4.) Plaintiffs allege that Ms. Patel was employed by TruGreen Global and True Green Recycling to assist with the phone inventory. (Am. Compl. ¶ 15.)

8. Empower Tomorrow is a North Carolina nonprofit corporation with its principal place of business in Raleigh, North Carolina. (Am. Compl. ¶ 5.) Empower Tomorrow was co-founded by Mr. Kumar and Ms. Patel “for the charitable purpose of donating proceeds and business profits to needy schoolchildren and families in India.” (Am. Compl. ¶ 9.)

9. Plaintiffs allege that Mr. Kumar was at all relevant times a member of Empower Tomorrow, but that he resigned as an officer on or about 19 June 2023. (Am. Compl. ¶ 6.)

B. Empower Tomorrow’s Formation and Early Years of Operation

10. Empower Tomorrow’s Articles of Incorporation were filed with the North Carolina Secretary of State on 12 August 2019. (Am. Compl. ¶ 9.) Mr. Kumar was

the initial registered agent. (Am. Compl. Ex. A at 1–2, ECF No. 11.1 [“Ex. A”].)¹ The Articles of Incorporation provide that the three incorporators were Ms. Patel, Pooja Patel, and Mr. Kumar and that Empower Tomorrow would have members. (Ex. A at 2.) Pooja Patel is Ms. Patel’s sister and began working for TruGreen Global in 2019. (Am. Compl. ¶ 16.)

11. In the optional chart for listing officers, the Articles of Incorporation list Ms. Patel and Pooja Patel as “members.” (Ex. A at 3.) Mr. Kumar is not listed on the Articles of Incorporation as an officer or member. (Ex. A at 3.)

12. Empower Tomorrow uses the same business model as TruGreen Global and True Green Recycling: it purchases used smartphones and electronic devices from third-party sellers, refurbishes and restores them, and then resells the products on websites such as eBay with proceeds going to charities based in India. (Am. Compl. ¶¶ 17–18.)

13. Plaintiffs allege that Mr. Kumar primarily ensured that Empower Tomorrow had sufficient inventory to sell that was appropriately priced for resale. (Am. Compl. ¶ 21.) Mr. Kumar also paid Empower Tomorrow’s invoices as they became due. (Am. Compl. ¶ 21.) Plaintiffs allege that Mr. Kumar used his eBay account, “Wholesalebiz01,” to buy and sell phones for Empower Tomorrow. (Am. Compl. ¶ 23.)

¹ The Exhibits to the Amended Complaint were filed in one document. (ECF No. 11.1.) For ease of citation, the Court does not include the ECF No. at each subsequent citation to the exhibits therein, and instead cites the exhibits as follows: (Ex. [] at [].)

14. To assist Empower Tomorrow in its initial operations, Plaintiffs allege that they “made numerous loans to Empower Tomorrow from the date of Empower [Tomorrow]’s incorporation to July 2022.” (Am. Compl. ¶ 10.) Plaintiffs allegedly loaned roughly \$500,000.00 to Empower Tomorrow between August 2019 and July 2022 so that “Empower [Tomorrow] could become profitable and serve its charitable purpose.” (Am. Compl. ¶ 22.)

15. Plaintiffs allege that the agreement with Defendants required Empower Tomorrow to reimburse Plaintiffs for the loans, and that repayment was required “as Empower [Tomorrow] became self-sufficient in the purchase of inventory *and* as Empower [Tomorrow] started to earn revenue from the sale of its own inventory.” (Am. Compl. ¶ 25 (emphasis added).) Plaintiffs allege that there were no conversations between Mr. Kumar and Ms. Patel about the funds and electronic inventory being gifted or donated to Empower Tomorrow. (Am. Compl. ¶ 26.)

16. In 2020, Empower Tomorrow slowed its work due to the COVID-19 pandemic. (Am. Compl. ¶ 30.)

17. Plaintiffs allege that on 5 January 2021, Mr. Kumar filed Empower Tomorrow’s IRS Form 990-EZ, attached to the Amended Complaint as Exhibit B. (Am. Compl. ¶ 32; *see* Ex. B.)

C. Plaintiffs’ Loans to Empower Tomorrow

18. Plaintiffs specifically allege numerous instances where Plaintiffs gave money or inventory to Empower Tomorrow: (1) a 25 March 2020 payment of \$25,000.00 to Defendants for Empower Tomorrow to purchase electronic inventory,

(Am. Compl. ¶ 35; Ex. C); (2) two payments on 21 May 2020 of \$60,000.00 and \$1,788.00 to Defendants for Empower Tomorrow to purchase electronic inventory, (Am. Compl. ¶ 36; Ex. D); (3) a 16 November 2021 purchase of \$39,636.00 with a third-party electronics supplier for 100 Apple iPhone 12s 64GB, all of which were sent to Empower Tomorrow for it to refurbish and resell, (Am. Compl. ¶ 37; Ex. E); (4) a 14 December 2021 purchase of \$35,456.00 with a third-party electronics supplier for inventory sent to Empower Tomorrow for it to refurbish and resell, (Am. Compl. ¶ 38; Ex. F); and (5) a 5 January 2022 purchase of \$76,565.00 to a third-party electronics supplier for iPhones which were then sent to Empower Tomorrow for it to refurbish and resell, (Am. Compl. ¶ 39; Ex. G).

19. Plaintiffs allege that these loans and purchases are illustrative examples of the numerous additional loans Mr. Kumar made, by and through TruGreen Global and True Green Recycling, to Defendants. (Am. Compl. ¶ 40.) According to Plaintiffs, all parties agreed “that Empower [Tomorrow] would eventually repay the Plaintiffs for the payment for the Apple iPhones and other electronic inventory.” (Am. Compl. ¶ 40.)

20. By July 2022, Plaintiffs stopped making loans to Empower Tomorrow because it could purchase inventory on its own. (Am. Compl. ¶ 41.)

D. The Agreement for Salary

21. Mr. Kumar did not receive a salary for work completed for Empower Tomorrow between “August 2018 to May 2023[.]” (Am. Compl. ¶ 46.)

22. In May 2023, Plaintiffs allege that Mr. Kumar and Ms. Patel agreed that they would each begin receiving annual salaries of \$55,000.00 from Empower Tomorrow. (Am. Compl. ¶ 46.) Mr. Kumar alleges that he received approximately \$4,200.00 after this agreement was reached. (Am. Compl. ¶ 46.)

23. Around the same time, Mr. Kumar and Ms. Patel further agreed that they would receive “owed salaries of \$55,000.00 from Empower [Tomorrow] for their work for the Company from August 2019 to May 2023.” (Am. Compl. ¶ 47.) This alleged agreement provided that the pair would receive the \$55,000.00 salaries for their work from 2019 through 2023, and that they “would receive these salary amounts as soon as Empower [Tomorrow] became profitable *and* surpassed monthly net revenue equal to or greater than \$10,000.00 per month.” (Am. Compl. ¶ 47 (emphasis added).) The Amended Complaint contains no allegation stating when, if ever, Empower Tomorrow became profitable *and* surpassed a monthly revenue of \$10,000.00. (*See* Am. Compl.)

24. Due to disagreements with Ms. Patel, Mr. Kumar resigned as an officer of Empower Tomorrow effective 19 June 2023. (Am. Compl. ¶ 49.) At that time, Empower Tomorrow did not have bylaws because it had not adopted any. (Am. Compl. ¶ 50.) Plaintiffs allege, however, that Mr. Kumar “never relinquished any rights as a member of Empower Tomorrow.” (Am. Compl. ¶ 51.)

25. Plaintiffs allege that Ms. Patel has since “converted” Mr. Kumar’s eBay account, “Wholesalebiz01,” for Defendants’ use and that Mr. Kumar has been unable to access the account. (Am. Compl. ¶ 52.)

E. Procedural Background

26. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Motions.

27. This action was initiated on the 18 July 2023 filing of the Complaint. (ECF No. 3.) The case was thereafter designated as a mandatory complex business case on 9 August 2023 and assigned to the undersigned on 10 August 2023. (ECF Nos. 1–2.)

28. Plaintiffs thereafter filed the Amended Complaint as a matter of right. (*See* Am. Compl.) Plaintiffs allege eleven claims for relief: (1) breach of contract for nonpayment of loans against Defendants, (Am. Compl. ¶¶ 54–56); (2) unjust enrichment for nonpayment of loans against Defendants, (Am. Compl. ¶¶ 58–68); (3) breach of contract for salary owed to Mr. Kumar against Defendants (“Count Three”), (Am. Compl. ¶¶ 70–76); (4) unjust enrichment for salary owed to Mr. Kumar against Defendants (“Count Four”), (Am. Compl. ¶¶ 78–88); (5) breach of fiduciary duty against Ms. Patel (“Count Five”), (Am. Compl. ¶¶ 90–94); (6) fraud against Ms. Patel (“Count Six”), (Am. Compl. ¶¶ 96–99); (7) negligent misrepresentation against Ms. Patel (“Count Seven”), (Am. Compl. ¶¶ 101–05); (8) constructive fraud against Ms. Patel (“Count Eight”), (Am. Compl. ¶¶ 107–10); (9) accounting against Empower Tomorrow (“Count Nine”), (Am. Compl. ¶¶ 112–14); (10) conversion against Defendants (“Count Ten”), (Am. Compl. ¶¶ 116–21); and (11) judicial dissolution against Empower Tomorrow (“Count Eleven”), (Am. Compl. ¶¶ 123–26).

29. Defendants thereafter filed the Motions, seeking dismissal of nearly all claims in the Amended Complaint. (*See* Empower Tomorrow Mot.; Patel Mot.)

30. Following full briefing on the Motions, the Court held a hearing on 29 January 2024 (the “Hearing”) at which all parties were present and represented through counsel. (See ECF No. 26.)

31. The Motions are ripe for resolution.

III. LEGAL STANDARD

A. Rule 12(b)(6)

32. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Amended Complaint in the light most favorable to Plaintiffs. See *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court’s inquiry is “whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]” *Harris v. NCNB Nat’l Bank*, 85 N.C. App. 669, 670 (1987) (citation omitted). The Court accepts all well-pleaded factual allegations in the relevant pleading as true. See *Krawiec v. Manly*, 370 N.C. 602, 606 (2018). The Court is therefore 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) (cleaned up).

33. Furthermore, the Court “can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint.” *Moch v. A.M. Pappas & Assocs., LLC.*, 251 N.C. App. 198, 206 (2016) (citation omitted). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment.

Id. (citation omitted). Moreover, the Court “may properly consider documents which are the subject of a plaintiff’s complaint and to which the complaint specifically refers even though they are presented by the defendant.” *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citation omitted).

34. Our Supreme Court has noted that “[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when ‘(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.’” *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)). This standard of review for Rule 12(b)(6) is the standard our Supreme Court “uses routinely . . . in assessing the sufficiency of complaints in the context of complex commercial litigation.” *Id.* at 615 n.7 (citations omitted).

B. Rule 12(b)(1)

35. A court shall dismiss the action when it appears that the court lacks subject matter jurisdiction. N.C.G.S. § 1A-1, Rule 12(h)(3). A defect in subject matter jurisdiction may be raised by a party or by the court *sua sponte*. *Conner Bros. Mach. Co. v. Rogers*, 177 N.C. App. 560, 561 (2006). “A motion to dismiss for lack of subject matter jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim upon which relief can be granted.” *Tart v. Walker*, 38 N.C. App. 500, 502 (1978). A court may consider matters outside the pleadings in determining

whether subject matter jurisdiction exists. *Id.* at 502; *Keith v. Wallerich*, 201 N.C. App. 550, 554 (2009).

IV. ANALYSIS

36. Empower Tomorrow seeks dismissal of all claims against it pursuant to Rules 12(b)(1) and 12(b)(6), but its brief in support of the motion addresses only Counts Three, Four, Nine, Ten, and Eleven.² (*See* Br. Supp. Empower Tomorrow Mot., ECF No. 19 [“Empower Tomorrow Br. Supp.”].) Ms. Patel seeks dismissal of Counts Five, Six, Seven, Eight, and Ten. (*See* Br. Supp. Patel Mot., ECF No. 21 [“Patel Br. Supp.”].)

37. The Court begins its consideration of the Motions with Count Ten, as both Defendants seek dismissal of that claim. The Court then turns to Empower Tomorrow’s Motion and the claims that it seeks to dismiss, concluding with claims that Ms. Patel seeks dismissal of in her motion.

A. Count Ten: Conversion

38. Plaintiffs allege a claim for conversion against Defendants, contending that (1) Defendants wrongfully took and converted to their own use the loans and purchased inventory, and (2) Ms. Patel converted Mr. Kumar’s eBay account. (Am. Compl. ¶¶ 116, 118.)

39. Defendants argue that dismissal of Count Ten is proper in part because the nonpayment of loans cannot form the basis for a conversion claim. (Empower Tomorrow Br. Supp. 5, 12–13; Patel Br. Supp. 22–23.)

² At the Hearing, Empower Tomorrow’s counsel confirmed that it does not seek dismissal of the first two claims alleged in the Amended Complaint.

40. Under North Carolina law, “Two essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant.” *Steele v. Bowden*, 238 N.C. App. 566, 574 (2014) (cleaned up). In cases where defendant comes into possession of plaintiff’s property lawfully, plaintiff must show that it made a demand for the return of the property that was refused by defendant. *Hoch v. Young*, 63 N.C. App. 480, 483 (1983) (citations omitted). Further, “‘there is no conversion until some act is done which is a denial or violation of the plaintiff’s dominion over or rights in the property.’” *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86 (2008) (quoting *Lake Mart Ltd. P’ship v. Johnston*, 145 N.C. App. 525, 532, *rev. denied*, 354 N.C. 363 (2001)).

41. “In North Carolina, only goods and personal property are properly the subjects of a claim for conversion.” *Norman v. Nash Johnson & Sons’ Farms, Inc.*, 140 N.C. App. 390, 414 (2000) (“[I]ntangible interests such as business opportunities and expectancy interests [are not] subject to a conversion claim.”) (citation omitted); *see also Global Textile All., Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 159, at *33–34 (N.C. Super. Ct. Nov. 29, 2018) (dismissing plaintiff’s claim for conversion because it was based on intangible information and failed to allege a deprivation of use or access to such information); *Window World of N. Atlanta, Inc. v. Window World, Inc.*, 2018 NCBC LEXIS 111, at *8–9 (N.C. Super. Ct. Oct. 22, 2018) (dismissing plaintiffs’ conversion claim in part because rights under an oral agreement are intangible or contract are intangible interests).

42. As an initial matter, Plaintiffs' conversion claim as to nonpayment of the loan balance, or alleged default on the various loans, cannot serve as a basis for a conversion claim. Further, the parties have not directed the Court to caselaw in this State suggesting that failure to pay a debt constitutes conversion. (See Empower Tomorrow Br. Supp. 13; Patel Br. Supp. 23; Defs. Br. Opp'n Patel Mot. 20–21 [“Br. Opp. Patel Mot.”].) Empower Tomorrow directs the Court to several decisions from other jurisdictions which reject Plaintiffs' theory, (Empower Tomorrow Br. Supp. 13), and Plaintiffs do not address this argument, (see Pls.' Br. Opp. Empower Tomorrow Mot. 17, ECF No. 23 [“Br. Opp. Empower Tomorrow Mot.”]).

43. Defendants came into possession of the alleged loans lawfully and the Amended Complaint does not contain an allegation that Plaintiffs made a demand for the return of the money and inventory which Defendants refused. The Court agrees with Defendants that a mere failure to pay a debt does not amount to a civil claim for conversion. See *JP Morgan Chase Bank, N.A. v. Smith Bros. Builders & Supply, Inc.*, 2009 U.S. Dist. LEXIS 68450, at *4–5 (S.D. Ind. 2009) (citing *Kopis v. Savage*, 498 N.E.2d 1266, 1270 (Ind. App. 1986), for the proposition that a failure to repay was a failure to pay debt but not conversion).

44. Further, to the extent the conversion claim is based on a contention that Empower Tomorrow used loan proceeds to purchase inventory, or that Plaintiffs' purchased inventory and expected the amount spent to be repaid, Empower Tomorrow would be the rightful owner of that inventory. Thus, it could not logically

be the basis for a conversion claim absent allegations that one or more of the Plaintiffs had a valid possessory interest in the property.

45. Therefore, the Motions are **GRANTED** in part and Plaintiffs' Count Ten for conversion is **DISMISSED** with prejudice as to the loans to Defendants.

46. Next, the Court must consider whether Mr. Kumar's eBay account is tangible property capable of being converted, which appears to be an issue of first impression in this State.

47. "The nature of the allegedly converted property is important because North Carolina does not recognize a claim for conversion of intangible interests." *Strategic Mgmt. Decisions v. Sales Performance Int'l*, 2017 NCBC LEXIS 69, at *6 (N.C. Super. Ct. Aug. 7, 2017) (citations omitted). It seems to the Court that claims for conversion of electronically stored information tend to concern the taking and deprivation of electronic data and information stored within a program, rather than the login access information to the program or account as we have here. *See Comput. Design & Integration, LLC v. Brown*, 2018 NCBC LEXIS 216, at **70–72 (N.C. Super. Ct. Dec. 10, 2018) (concerning business records maintained electronically on a removed server); *HCW Ret. & Fin. Servs., LLC v. HCW Emple. Benefit Servs., LLC*, 2015 NCBC LEXIS 73, at *59–61 (N.C. Super. Ct. July 14, 2015) (concerning proprietary information maintained on a SalesLogix database); *New Friendship Used Clothing Collection, LLC v. Katz*, 2017 NCBC LEXIS 72, at *38–40 (N.C. Super. Ct. Aug. 18, 2017) (concerning an electronic copy of an asset purchase agreement). It seems clear that our courts have determined that making a copy of electronically-stored

information does not support a claim for conversion, but that allegations of outright deletion or complete deprivation of the documents would suffice. *Roesel v. Roesel*, 2023 NCBC LEXIS 157, at *9–10 (N.C. Super. Ct. Nov. 29, 2023) (collecting cases); *Duo-Fast Carolinas, Inc. v. Scott's Hill Hardware & Supply Co.*, 2018 NCBC LEXIS 2, at *36 (N.C. Super. Ct. Jan. 2, 2018) (“[R]etention by a wrongdoer of an electronic copy in a manner that does not deprive the original owner of access to the same electronic data cannot constitute conversion under current North Carolina law.”).

48. Based on the Court’s thorough review of the allegations in the Amended Complaint, Plaintiffs used the eBay account as a means of purchasing and selling electronics, similar to visiting an electronics store in-person. (Am. Compl. ¶¶ 18, 23.) Plaintiffs take issue only with Defendants’ “blocking Mr. Kumar from access to his eBay account and failing to allow him the proper access so he continue [sic] his own buying and selling on the online marketplace.” (Am. Compl. ¶ 119.)

49. Real property, such as a brick-and-mortar electronics store, is incapable of being converted and it would logically follow that preventing access to an electronics store would not give rise to a cause of action for conversion. *See Willard v. Barger*, 2020 NCBC LEXIS 117, at **23 (N.C. Super. Ct. Oct. 9, 2020) (“[R]eal property and intangible interests cannot properly be the subject of a conversion claim.”). It is counterintuitive to the Court to extend a claim for conversion to the cyber corollary: an online electronics store platform.

50. Furthermore, the eBay account at issue still exists. The account has not been deleted and Defendants have not caused a complete deprivation, two hallmarks

our Courts look for when analyzing claims for conversion of electronic property. Neither side has pointed the Court to guidance from our Supreme Court or Court of Appeals regarding online platform login information and whether that may be subject to a claim for conversion.

51. “In the absence of further guidance from the North Carolina Supreme Court or Court of Appeals, the Court declines to construe the law of conversion more broadly.” *Duo-Fast Carolinas, Inc.*, 2018 NCBC LEXIS 2, at *36. Therefore, the Motions are **GRANTED** in part and Plaintiffs’ Count Ten is **DISMISSED** with prejudice as to Mr. Kumar’s claim for conversion of his eBay account.³

B. Count Nine: Accounting

52. “The remedy of an equitable accounting may be available when a plaintiff has asserted a valid claim for relief in equity and an accounting is necessary to compel discovery of information regarding accounts held exclusively by the defendant.” *Miller v. Burlington Chem. Co., LLC*, 2017 NCBC LEXIS 6, at *36 (N.C. Super. Ct. Jan. 27, 2017) (quoting *Mkt. Choice, Inc. v. New Eng. Coffee Co.*, 2009 U.S. Dist. LEXIS 73627, at *35–36 (W.D.N.C. Aug. 18, 2009)). A claim for accounting is not an independent cause of action but a remedy, and “is available only if the plaintiff first shows that he lacks an adequate remedy at law and alleges facts in the complaint to that effect.” *Elhulu v. Alshalabi*, 2021 NCBC LEXIS 44, at **20 (N.C. Super. Ct. Apr. 29, 2021) (citation omitted).

³ “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).

53. Plaintiffs argue that an “accounting is necessary to compare and reconcile the amounts of the monetary loans and inventory loans made by Plaintiff Kumar with Empower [Tomorrow]’s bank statements, financial statements, and inventory records.” (Br. Opp. Empower Tomorrow Mot. 12.) Notwithstanding that contention, Plaintiffs may effectively obtain the same relief through discovery related to Plaintiffs’ claims for breach of contract and unjust enrichment, which neither Defendant seeks to dismiss. Further, Plaintiffs failed to allege or argue any clear reason why discovery would be insufficient.

54. Therefore, the Court determines that Plaintiffs have failed to sufficiently allege facts that warrant an equitable accounting. Empower Tomorrow’s Motion is therefore **GRANTED** in part and Count Nine is **DISMISSED** without prejudice.⁴

C. Counts Three and Four: Breach of Contract and Unjust Enrichment

55. Empower Tomorrow seeks dismissal of Counts Three and Four for breach of contract and unjust enrichment for the alleged salary owed to Mr. Kumar. (Empower Tomorrow Br. Supp. 14–15, 17.) Mr. Kumar seeks an annual salary of \$55,000.00 from Empower Tomorrow for the period August 2019 to May 2023. (*See* Am. Compl. ¶¶ 70–72.)

⁴ Notwithstanding the Court’s conclusions that this claim should be dismissed, “[t]he decision to dismiss an action with or without prejudice is in the discretion of the trial court.” *First Fed. Bank*, 230 N.C. App. at 191. The Court concludes, in the exercise of its discretion, that dismissal of Plaintiffs’ Count Nine should be without prejudice to Plaintiffs’ right to attempt to reassert such claim through proper factual allegations by way of a motion to amend.

1. Count Three: Breach of Contract

56. To state a claim for breach of contract, a plaintiff must allege that a valid contract exists and was breached. *See Poor v. Hill*, 138 N.C. App. 19, 26 (2000). “If the contract ‘contains some condition precedent to defendant’s liability,’ the plaintiff must also allege that the condition has been met.” *Upchurch v. Sapp*, 2020 NCBC LEXIS 118, at *5 (N.C. Super. Ct. Oct. 8, 2020) (quoting *Beachboard v. S. Ry. Co.*, 16 N.C. App. 671, 681 (1972) (citation omitted)). “A condition precedent is a fact or event that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty.” *Mosely v. WAM, Inc.*, 167 N.C. App. 594, 600 (2004) (citation omitted).

57. Here, Mr. Kumar alleges that he and Ms. Patel “agreed that Empower [Tomorrow] would pay back-owed \$55,0000.00 [sic] yearly salaries from Empower [Tomorrow]” to them both for “their work for the Company from August 2019 to May 2023.” (Am. Compl. ¶ 72.) However, Mr. Kumar also alleges that the pair would receive the \$55,000.00 for each previous year “as soon as Empower [Tomorrow] became profitable *and* surpassed monthly net revenue equal to or greater than \$10,000.00 per month.” (Am. Compl. ¶ 47 (emphasis added).)

58. The use of language like “as soon as” indicates a condition precedent. *Craftique, Inc. v. Stevens & Co.*, 321 N.C. 564, 567 (1988) (“The use of language such as ‘when,’ ‘after,’ and ‘as soon as’ clearly indicates that a promise will not be performed except upon the happening of a stated event, i.e., a condition precedent.”). The Amended Complaint does not contain an allegation, even generally, that the two

conditions—specific profitability and revenue goals—were met. (See Am. Compl. ¶¶ 41, 46–47, 71–75.)

59. At the Hearing, Mr. Kumar’s counsel directed the Court to Plaintiffs’ allegations that: (1) in July 2022—ten months before the agreement at issue was reached—Plaintiffs ceased to provide loans to Empower Tomorrow because it could purchase inventory on its own, (Am. Compl. ¶ 41); and (2) Mr. Kumar received approximately \$4,200.00 as a result of a separate agreement in May 2023 that Mr. Kumar and Ms. Patel would begin receiving an annual salary of \$55,000.00, (Am. Compl. ¶ 46). Even resolving all inferences in the light most favorable to Plaintiffs, these allegations do not give rise to an inference that the conditions precedent were satisfied.

60. Therefore, the Court **GRANTS** in part Empower Tomorrow’s Motion and hereby **DISMISSES** without prejudice Count Three for breach of contract as to Empower Tomorrow.

2. Count Four: Unjust Enrichment

61. To sufficiently state a claim for unjust enrichment, a party must allege that: “(1) it conferred a benefit on another party; (2) the other party consciously accepted the benefit; and (3) the benefit was not conferred gratuitously or by an interference in the affairs of the other party.” *Worley v. Moore*, 2018 NCBC LEXIS 114, at *25 (N.C. Super. Ct. Nov. 2, 2018) (citing *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002)). “A claim for unjust enrichment ‘is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law.’” *Cty. of Wake*

PDF Elec. & Supply Co., LLC v. Jacobsen, 2020 NCBC LEXIS 103, at *28 (N.C. Super. Ct. Sept. 9, 2020) (quoting *Booe v. Shadrick*, 322 N.C. 567, 570 (1988)).

62. “There is no claim for unjust enrichment if the benefit was ‘voluntarily bestowed without solicitation or inducement.’” *Herrera v. Charlotte Sch. of Law, LLC*, 2018 NCBC LEXIS 35, at *49 (N.C. Super. Ct. Apr. 20, 2018) (quoting *HOMEQ v. Watkins*, 154 N.C. App. 731, 733 (2002)).

63. Plaintiffs have failed to properly allege facts supporting each of the elements of an unjust enrichment claim. See *Rabinowitz v. Suwillaga*, 2019 NCBC LEXIS 8, at *26 (N.C. Super. Ct. Jan. 28, 2019) (“This Court is not required to accept [a] conclusory claim that these services were not gratuitous in the absence of any factual allegations to support such a conclusion.”); *Hampton v. Hanzel*, 2019 NCBC LEXIS 69, at *8 (N.C. Super. Ct. Nov. 18, 2019).

64. Mr. Kumar alleges that he expected payment in the form of a salary as “Defendants agreed that [he] would eventually receive a back-owed salary payment once Empower [Tomorrow] became a profitable business.” (Am. Compl. ¶ 80.) Further, he alleges that “Empower [Tomorrow] received Mr. Kumar’s experience, skills, services, and goodwill with the knowledge and/or reason to know that Mr. Kumar expected to be paid back for his time invested into Empower [Tomorrow].” (Am. Compl. ¶ 83.) These allegations are not sufficient to allege that Empower Tomorrow consciously accepted the benefit.

65. Further, and notwithstanding those allegations, Mr. Kumar alleges that he and Ms. Patel did not decide to receive “owed salaries of \$55,0000.00 [sic] from

Empower [Tomorrow]” until May 2023. (Am. Compl. ¶ 47.) Based on this allegation, it appears that Mr. Kumar’s services between August 2019 through April 2023 were conferred gratuitously. The Court notes that there is a difference between providing services (1) knowing *at the time* that you would be compensated in the form of a salary, and (2) deciding *years after the fact* that you would receive a salary for work already completed on what appeared to be a volunteer basis. The allegations demonstrate that Mr. Kumar’s services were conferred gratuitously between August 2019 and May 2023.

66. Reading the allegations in the Amended Complaint as a whole, Mr. Kumar fails to state a claim for unjust enrichment because his services for Empower Tomorrow were gratuitous through April 2023. Therefore, Empower Tomorrow’s Motion is **GRANTED** in part and Count Four is **DISMISSED** without prejudice as to Empower Tomorrow.

D. Count Eleven: Member Judicial Dissolution

67. Empower Tomorrow seeks dismissal of Plaintiffs’ Count Eleven, arguing in part that, despite Mr. Kumar’s allegations in the Amended Complaint, the Articles of Incorporation attached thereto demonstrate that Mr. Kumar is not, and never was, a member of Empower Tomorrow and therefore does not have standing to bring such a claim. (See Empower Tomorrow Br. Supp. 7–10.) The Court agrees.

68. The North Carolina Nonprofit Corporation Act, N.C.G.S. § 55A-1-01 *et seq.* (the “Act”), provides a statutory basis for seeking judicial dissolution in a proceeding by a member or director if certain information is established. N.C.G.S. § 55A-14-

30(a)(2). A plain reading of the statute demonstrates that the Court “may dissolve a [nonprofit] corporation . . . [i]n a proceeding by a *member* or *director*,” which necessarily requires that the person seeking dissolution be a member or director of the nonprofit corporation at issue. *Id.* (emphasis added).

69. Here, Mr. Kumar contends that he is a member of Empower Tomorrow. (Br. Opp. Empower Tomorrow Mot. 5–6.) He also alleges that Empower Tomorrow did not have bylaws while he was an officer and member of it. (Am. Compl. ¶ 50.) The Court must therefore rely on the provisions of the Act to understand what it means to be a member or director of Empower Tomorrow.

70. The Act defines a member as a person who “by the articles of incorporation or bylaws of the corporation, [is] either (i) specifically designated as a member or (ii) included in a category of persons specifically designated as members. A person is not a member solely by reason of having voting rights or other rights associated with membership.” N.C.G.S. § 55A-1-40(16).

71. Since Plaintiffs allege that Empower Tomorrow did not have bylaws during the period at issue, the Court must consider the Articles of Incorporation. As stated herein, the Articles of Incorporation attached to the Amended Complaint do not list Mr. Kumar as a member, and instead list only Ms. Patel and Pooja Patel as members. (*See* Ex. A at 2–3.) Mr. Kumar was listed only as an incorporator.

72. Therefore, the Court **GRANTS** in part Empower Tomorrow’s Motion pursuant to Rule 12(b)(1) because the Articles of Incorporation clearly contradict and negate Mr. Kumar’s allegation that he was a member of Empower Tomorrow, and

therefore he does not have standing to bring the claim. Count Eleven for judicial dissolution is therefore **DISMISSED** without prejudice.

E. Counts Five and Eight: Breach of Fiduciary Duty and Constructive Fraud

73. Ms. Patel seeks dismissal of Counts Five and Eight, arguing, in relevant part, that (1) the TruGreen Global and True Green Recycling do not allege that Ms. Patel was their fiduciary, (Patel Br. Supp. 6), and (2) Mr. Kumar's allegations of a fiduciary duty are insufficient as a matter of law, (Patel Br. Supp. 10–11).

74. A breach of fiduciary duty claim requires: (1) a fiduciary duty owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) defendant's conduct proximately causing injury to the plaintiff. *Chisum v. Campagna*, 376 N.C. 680, 706 (2021) (quotation omitted). "A claim for breach of fiduciary duty cannot exist in the absence of a fiduciary relationship between the parties." *Sykes v. Health Network Sols., Inc.*, 2017 NCBC LEXIS 73, at *67 (N.C. Super. Ct. Aug. 18, 2017) (citing *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

75. "Claims for breach of fiduciary duty and constructive fraud are often paired together, as they are here." *Potts v. KEL, LLC*, 2019 NCBC LEXIS 30, at *10 (N.C. Super. Ct. May 9, 2019). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294 (2004).

76. First, members of a nonprofit corporation do not owe fiduciary duties to other members or the corporation, but rather only directors and officers of nonprofit

corporations owe fiduciary duties to the corporation. *See* N.C.G.S. §§ 55A-8-30(a), 55A-8-42(a); *Vill. at Motts Landing Homeowners' Ass'n v. Aftew Props.*, 2023 NCBC LEXIS 100, at **7–8 (N.C. Super. Ct. Aug. 14, 2023).

77. Thus, Ms. Patel had fiduciary obligations to Empower Tomorrow as an officer, but not to Mr. Kumar. Ms. Patel simply does not owe *de jure* fiduciary duties to Plaintiffs based on the allegations in the Amended Complaint.

78. Since Plaintiffs and Ms. Patel do not stand in a legal relationship which imposes a *de jure* fiduciary duty on Ms. Patel to Plaintiffs, the Court next considers whether she owed Plaintiffs a *de facto* fiduciary duty.

79. “The standard for finding a *de facto* fiduciary relationship is a demanding one: [o]nly 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, 633 (2016) (cleaned up).

80. The general rule is that “the relation of employer and employee is not one of those regarded as confidential” such that a fiduciary duty arises. *Dalton*, 353 N.C. at 652. It appears from the allegations of the Amended Complaint that Ms. Patel’s only relationship with TruGreen Global and True Green Recycling was as an employee, and Plaintiffs do not allege facts beyond a typical employer-employee relationship sufficient to give rise to fiduciary obligations. *Langley v. Autocraft, Inc.* 2023 NCBC LEXIS 95, at **14–15 (N.C. Super. Ct. Aug. 8, 2023) (“North Carolina’s courts have consistently held that such a position does not give rise to fiduciary

responsibilities absent allegations of extraordinary facts that, if proven, would establish that the employee controlled his employer to the point of domination.”).

81. The allegations contained in the Amended Complaint also cannot reasonably be construed as asserting the existence of a *de facto* fiduciary relationship between Ms. Patel and Mr. Kumar. The relationship between the pair as alleged is devoid of the typical allegations of control giving rise to such a relationship.

82. For example, Mr. Kumar at all times had the ability to cease providing money and inventory to Defendants and to demand repayment of the purported loans. Further, at any time Mr. Kumar could have required Defendants to cease using his eBay account for resale of the electronics or to make a demand to that effect. Among other things, Mr. Kumar could have withdrawn as an officer of Empower Tomorrow if he disagreed with the direction in which it was moving, or sought to file a member derivative action as provided by statute if he was in fact a member. Mr. Kumar did none of these things.

83. Plaintiffs have failed to allege sufficient facts that Ms. Patel owed them a fiduciary duty. Therefore, the Court **GRANTS** in part Patel’s Motion and Counts Five and Eight are hereby **DISMISSED** with prejudice.

F. Counts Six and Seven: Fraud and Negligent Misrepresentation

84. Ms. Patel seeks dismissal of Counts Six and Seven, arguing that (1) Plaintiffs’ allegations fail to comport with Rule 9(b), and (2) there is no allegation regarding any investigation or an attempt to investigate Ms. Patel’s alleged fraudulent conduct. (Patel Br. Supp. 20–21.)

85. To survive dismissal, Plaintiffs must allege the five essential elements of a fraud claim: “(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, [and] (5) resulting in damage to the injured party.” *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974) (citing *Pritchard v. Dailey*, 168 N.C. 330, 332 (1915)). Further, Plaintiffs’ reliance on a fraudulent misrepresentation “must be reasonable.” *Forbis v. Neal*, 361 N.C. 519, 527 (2007) (citing *Johnson v. Owens*, 263 N.C. 754, 757 (1965)). Reliance is not reasonable if Plaintiffs fail to make any independent investigation as to the truth of the assertion. *Calloway v. Wyatt*, 246 N.C. 129, 130 (1957); *Saunders v. Hatterman*, 24 N.C. 32, 34 (1841).

86. There is an additional requirement. Rule 9 requires that fraud be pleaded with particularity. N.C.G.S. § 1A-1, Rule 9(b). “A pleader meets the requirements of [Rule 9] when its fraud claim alleges 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 acts or representations.’” *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at **6 (N.C. Super. Ct. June 18, 2007) (citing *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39 (2006)). “Mere generalities and conclusory allegations of fraud will not suffice.” *Sharp v. Teague*, 113 N.C. App. 589, 597 (1994).

87. Plaintiffs allege that Ms. Patel made seven intentional misrepresentations to them, but Plaintiffs have not alleged the time, place, or the specific content of any

alleged misstatement by Ms. Patel. (*See* Am. Compl. ¶¶ 96.a.–g.) The allegations are therefore clearly deficient as to specificity under Rule 9(b).

88. Furthermore, the Court agrees with Ms. Patel’s argument that Plaintiffs have failed to allege facts constituting reasonable reliance. (*See* Patel Br. Supp. 21.) Plaintiffs do not even generally assert that their reliance was reasonable in an exercise of due diligence. (*See* Am. Compl. ¶¶ 95–99.) In opposition to Patel’s Motion, Plaintiffs argue that they relied on Ms. Patel’s representation “that she would repay the loans, to the detriment of never receiving any loans repaid to them.” (Br. Opp. Patel Mot. 15 (citing Am. Compl. ¶ 97).) This statement in a brief, however, does not constitute an allegation of reasonable reliance or relieve Plaintiffs of the obligation to properly allege the elements of the claims raised.

89. Therefore, Patel’s Motion should be **GRANTED** in part and Plaintiffs’ Count Six for fraud should be **DISMISSED** without prejudice.

90. With respect to Plaintiffs’ Count Seven for negligent misrepresentation, “[i]t has long been held in North Carolina that ‘the tort of negligent misrepresentation occurs when (1) a party justifiably relies (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of care.’” *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532 (2000) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988)). The question of justifiable reliance in an action for negligent misrepresentation is “analogous to that of reasonable reliance in fraud actions.” *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224 (1999).

91. Plaintiffs' negligent misrepresentation claim is based upon the same seven statements that Plaintiffs allege amounted to fraud, and it fails for the same reasons.

92. Therefore, to the extent Patel's Motion seeks dismissal of Plaintiffs' claim for negligent misrepresentation, the Motion should be **GRANTED** and Count Seven is hereby **DISMISSED** without prejudice.

V. CONCLUSION

93. **THEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** the Motions. Counts Five, Eight, and Ten are hereby **DISMISSED** with prejudice and Counts Three, Four, Six, Seven, Nine, and Eleven are hereby **DISMISSED** without prejudice.

IT IS SO ORDERED, this the 28th day of February, 2024.

/s/ Michael L. Robinson

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