No. COA21-206 DISTRICT THIRTY A

NORTH CAROLINA COURT OF APPEALS

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REID GOLDSBY MILLER Plaintiff-Appellant, v. EASTERN BAND OF CHEROKEE INDIANS and/or other affiliated governmental entities and/or other affiliated private entities; WESTRIDGE RANCH, LLC; WALTER WILLIAM ELLSWORTH, III; RICHARD G. SNEED; ALAN B. ENSLEY; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; THE BUSINESS COMMITTEE OF THE EASTERN BAND OF CHEROKEE INDIANS; JOHN DOES 1-15 (fictitious names as identity is unknown); JANE DOES 1-15 (fictitious names as identity is unknown), Defendant-Appellees.	**From Graham County** **No.: 20 CVS 130**

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DEFENDANT-APPELLEE'S BRIEF

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STATEMENT OF THE FACTS

An extensive factual recitation is not necessary to support dismissal of the Plaintiff-Appellant's Complaint for lack of personal and/or subject matter jurisdiction; rather, it is enough to know she has sued a federally recognized Indian tribe (R p 3 ¶ 2), as well as the tribal entities and officials working on its behalf in their official capacities. (R p 4 ¶¶ 5-8).

As for the trial court's alternative grounds for dismissing Plaintiff-Appellant's Complaint under Rule 12(b)(6), for failure to state a claim upon which relief can be granted, the operative facts are as follows:

Plaintiff-Appellant purchased four tracts of land in Graham County in the "Little Snowbird Section" (hereinafter "Subject Property") from 1977 to 1985. (R p 6 ¶ 22, pp 49-51). In 1981 there was a dispute over a road easement with access to Subject Property between Plaintiff-Appellant and the Bird family, the owners of the parcel next to Subject Property. (R p 6 ¶ 23). However, the controversy was settled by a consent judgment and Plaintiff-Appellant maintained an easement over the Bird Family's tract (hereinafter the "Bird Road Easement"). Id. In 1992, Plaintiff-Appellant obtained another easement across Eastern Band of Cherokee Indian (hereinafter "EBCI") land that connected to the Bird Road Easement (hereinafter "Teesateskie Easement"). (R p 6 ¶ 24). Plaintiff-Appellant owned Subject Property until she sold it to Defendants Westridge, LLC and Walter William Ellsworth, III (hereinafter "Westridge/Ellsworth") on December 22, 2016. (R p 23 ¶ 171).

Plaintiff-Appellant used Subject Property for agricultural purposes including logging timber. (R p 7 ¶¶ 26-29). She was also attempting, starting in 2010, to secure a deal with XYZ Bottling to sell water from the spring located on Subject Property. Id. However, in 2012, Plaintiff-Appellant encountered tax issues on Subject Property, so on or about June 18, 2012, she listed Subject-Property for sale starting at $6,250,000. (R pp 8-9, ¶¶ 33-34, 47). Subsequently, Plaintiff-Appellant steadily decreased the price of Subject Property until February 27, 2013, when she lowered it "for a final time back to the extreme fire sale price of $2,635,000." (R p 10 ¶ 51a-f). Subject Property remained at that price until August 8, 2013, when Westridge/Ellsworth made an offer to purchase, and Plaintiff-Appellant accepted it. (R p 10 ¶ 51f, p 22 ¶ 161).

In the interim, while Subject Property was listed on the market between June 2012 to August 2013, Plaintiff-Appellant was still working to improve Subject Property so that she could secure a contract with XYZ Bottling. (R p 10 ¶ 51a-f, p 10 ¶ 52). Plaintiff-Appellant's biggest concern was upgrading the Bird Road Easement to an access road for water tanker trucks. (R p 8 ¶ 40, p 10 ¶ 52). The upgrades included "cutting back vegetation, grading and applying gravel, and repairing a slide area." (R p 8 ¶ 40). Plaintiff-Appellant communicated with EBCI about the Bird Road Easement improvements, and it was decided that the construction should proceed pursuant to North Carolina's Best Management Practices. (R p 10 ¶ 53).

Plaintiff-Appellant began work on the Bird Road Easement, but subsequently was delayed due to a series of setbacks. (R p 12 ¶ 67). A logging crew hired by

Plaintiff-Appellant to cut timber on Subject Property mistakenly cut some trees on the Bird property which resulted in a timber trespass bill for Plaintiff-Appellant. (R p 11 ¶¶ 56-64). The timber trespass caused friction between Plaintiff-Appellant and the Bird family. (R pp 11-12 ¶ 65). The EBCI and the Bureau of Indian Affairs sent surveyors to attempt to determine the correct location of the Bird Road Easement and right-of-way. (R p 13 ¶¶ 80-84). The survey started from North Carolina State Road 1115 (or Little Snowbird Road); however, the original tack or spike marker was no longer there, so the survey crew had to start fresh. Id. The survey found that Bird Road did not conform with the Bird Road Easement held by Plaintiff-Appellant. Id.

On July 13, 2013, the EBCI Office of Environment and Natural Resources Inspections Department issued a Stop Work Order to Plaintiff-Appellant for the Bird Road project. (R p 15 ¶ 98). The Order states that Plaintiff-Appellant's work on the Bird Road Easement was in violation of Soil Erosion and Sedimentation Control Ordinance 113D and that to correct the issue Plaintiff-Appellant would need to put in a silt fence below all disturbed soil as well as hydro seed all the disturbed soil. (R pp 61, 63). Plaintiff-Appellant put up silt fencing but did not hydro seed the disturbed soil. (R p 20 ¶ 142).

Subsequently, Plaintiff-Appellant received Westridge/Ellsworth's offer to purchase Subject Property on August 8, 2013. (R p 22 ¶ 161). Plaintiff-Appellant's tax issues with Subject Property continued. (R pp 23-24, 174-181). Westridge/Ellsworth also had financial issues and so had to re-negotiate the purchase agreement multiple times. (R p 24 ¶¶ 182-83, p 25 ¶¶ 193-96, p 26 ¶¶ 202-06, p 28-29 ¶¶ 220a-g). Finally,

on December 22, 2016, Plaintiff-Appellant and Westridge/Ellsworth closed on the sale/purchase of Subject Property. (R p 23 ¶ 171).

Westridge/Ellsworth owned Subject Property until they sold it to EBCI on August 15, 2019. (R p 35 ¶ 263).

ARGUMENT

The trial court's dismissal of the Plaintiff-Appellant's Complaint was proper because the Appellees' sovereign immunity bars Plaintiff-Appellant's claims. The exceptions and authorities asserted by Plaintiff-Appellant are either inapplicable or insufficient. Further, even if the Court were to look beyond the jurisdictional issues implicated by the Defendant-Appellees' sovereign immunity, the Plaintiff-Appellant's Complaint remains subject to dismissal under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff-Appellant's Complaint essentially seeks to visit liability for "seller's remorse" upon a remote, third-party purchaser; however, Plaintiff-Appellant has failed to plead any viable, recognized cause of action against the Defendant-Appellees under North Carolina law and, even if she had, those claims would be barred by the applicable statutes of limitations.

I. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT-APPELLEES BECAUSE SUCH CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY.

The "Commerce Clause" of the United States Constitution expressly recognizes four categories of sovereigns: the federal government (specifically Congress), foreign nations, the several states, and Indian tribes. Plaintiff-Appellant asserts in her Complaint that the Foreign Sovereign Immunity Act, 28 U.S.C. § 1330 et seq.

("FSIA"), waives the sovereign immunity of the Defendant-Appellees to suit in North Carolina Courts because the EBCI is a foreign nation. However, the EBCI is a federally recognized Indian tribe and distinct as a sovereign from foreign nations. Due to the longstanding recognition of the tribal sovereign immunity enjoyed by the Defendant-Appellees, and the lack of any applicable waiver of the same, Plaintiff-Appellant's claims necessarily fail and must be dismissed under 12(b)(1) and 12(b)(2), and 12(b)(6).

A. The EBCI has sovereign immunity.

Tribal immunity from suit is waived under only two circumstances: by Congress or by a tribe "expressly and unequivocally." State ex rel. Cooper v. Seneca-Cayuga Tobacco Co., 197 N.C. App. 176, 181, 676 S.E.2d 579, 583 (2009). This is true even with the EBCI's unique history and business charter from the State of North Carolina. Welch Contracting, Inc. v. N. Carolina Dep't of Transp., 175 N.C. App. 45, 55, 622 S.E.2d 691, 697 (2005) ("the charter granted to the EBCI by the State of North Carolina does not operate to waive the EBCI's tribal sovereign immunity"). This immunity even shields the Tribe against inherent state powers, such as eminent domain. United States v. 7,405.3 Acres, 97 F.2d 417 (4th Cir. 1938).

North Carolina Courts have also recognized that the sovereign immunity of an entity extends to the agents working for that entity in their official capacities. For example, in Wright v. Town of Zebulon, the plaintiff sued, among other defendants, a police department and numerous police officers in their individual and official capacities. 202 N.C. App. 540, 688 S.E.2d 786 (2010). Because the claims against the

police department were dismissed based on sovereign immunity, the court held that the claims against the police officers in their official capacity must also be dismissed. Id. at 543, 688 S.E.2d at 789. The court reasoned that, because the governmental entity was not capable of being sued directly, then neither was it capable of being sued indirectly through an official capacity suit against one of its officers. Id. ("Thus, in a suit where the plaintiff asserts a claim against a government entity, also naming those individuals working in their official capacity for the government entity is redundant.") (quoting May v. City of Durham, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000)) (internal quotations, bracketing omitted).

Here, Plaintiff-Appellant has sued the EBCI, which has sovereign immunity. Seneca-Cayuga Tobacco Co., 197 N.C. App. at 182, 676 S.E.2d at 583; Welch Contracting, Inc., 175 N.C. App. at 55, 622 S.E.2d at 697. Principal Chief Sneed and Vice-Chief Ensley are named defendants in their official capacities for the Tribe. (R p 4 ¶¶ 5-6). Accordingly, they have the same sovereign immunity protections as the Tribe. Wright, 202 N.C. App. at 543, 688 S.E.2d at 789. Plaintiff-Appellant has also named the Tribal Council, a branch of the EBCI tribal government, and the Business Committee, an agency of the EBCI tribal government. (R p. 4 ¶¶ 7-8). Because these are government branches and governmental agencies of the Tribe, they are also entitled to the Tribe's sovereign immunity protections. Seneca-Cayuga Tobacco Co., 197 N.C. App. at 182, 676 S.E.2d at 584 (specifically holding that the Business Committee of the EBCI has the same sovereign immunity as the Tribe); see Abbott v. N. Carolina Bd. of Nursing, 177 N.C. App. 45, 47, 627 S.E.2d 482, 484 (2006) (state

agency is entitled to the same sovereign immunity protections as the state). Plaintiff-Appellant's description of John and Jane Doe defendants[1] is conclusory and legally insufficient to provide notice to any particular defendants as necessitated by the North Carolina's pleading standard. (R p. 4 ¶ 9). Therefore, all properly named Defendant-Appellees are protected under the umbrella of tribal sovereign immunity.

B. There has been no waiver of the EBCI's sovereign immunity.

"An Indian tribe such as the EBCI is subject to suit only where Congress has authorized the suit, or the tribe has expressly and unequivocally waived its tribal sovereign immunity." Welch Contracting, Inc., 175 N.C. App. at 54, 622 S.E.2d at 696–97 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Oklahoma Tax Com. v. Potawatomi Tribe, 498 U.S. 505 (1991)). Further, the standard for finding "a waiver of tribal sovereign immunity is extremely difficult to satisfy." Smith v. Babbitt, 875 F. Supp. 1353, 1361 n.4 (D. Minn. 1995), cert. denied, 522 U.S. 807 (1997); see also E. Band of Cherokee Indians v. Lynch, 632 F.2d 373, 382 (4th Cir. 1980) (North Carolina's "authority [over tribe] cannot be inferred from ambiguous federal statutes.")

Plaintiff-Appellant claims that the FSIA, which appears in Sections 1330, 1391(f), 1441(d), and 1602 to 1611 of Title 28 of the United States Code, governs this matter and operates to waive the Tribe's sovereign immunity. (R p 4-6). In one of, if

[1] It is unclear if the pseudonymous defendants are tribal members, representatives, political officers, or otherwise. Defendants do not have sufficient notice to make that distinction and, therefore, have not expressly listed the pseudonymous parties among the other Defendant-Appellees.

not the only, prior case in which a plaintiff has argued the FSIA was a waiver of a defendant's tribal sovereign immunity, the United States Court of Appeals for the Ninth Circuit held that the act does not, by definition, apply. The court reasoned that,

> The plain language of section 1330(a) indicates that only parties within the definition of 'foreign state' are subject to the statute. Indian tribes, however, are not "foreign nations" or "foreign states," but rather "domestic dependent nations." Accordingly, because Indian tribes are not "foreign states," § 1330(a) cannot confer jurisdiction in federal court for suits against them. Without a valid basis for removal, the district court lacked jurisdiction.

Navarro v. Eagle Mountain Casino, 183 F. App'x 659, 661 (9th Cir. 2006) (internal citations omitted). In other words, this Act applies only to truly foreign nations, not Indian tribes. Indeed, in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), both the majority and dissenting opinions of the Supreme Court recognized the distinct—and superior, concerning immunity—sovereign status of Indian Tribes compared to foreign nations. Id. at 759-60, 765.

Section 1603(c) of the FSIA provides definitions. In contrast to a "foreign state", it defines the "United States" as "all territory and waters, continental or insular, subject to the jurisdiction of the United States." The entirety of applicable law is clear that Indian tribes are subject to the United States government's territorial jurisdiction. E.g., Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). This means Indian tribes must be covered by the definition of § 1603(c) as part of the United States, therefore necessarily not defined as a foreign state under § 1603(a). Thus, the FSIA and waiver of sovereign immunity of foreign states—as defined by § 1603(a)—does

not apply to Defendant-Appellees and is irrelevant as to the subject matter jurisdiction of this and any court.

C. Whether the Subject Property is "Indian Country" is irrelevant in the present context and Plaintiff-Appellant's reliance on the City of Sherrill case is misplaced.

Plaintiff-Appellant's heavy reliance upon City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), and other cases addressing the power of state and municipal governments to exercise taxing authority and/or criminal jurisdiction on Indian land is misplaced. Those cases are simply inapplicable in the context of this case, which has to do with the alleged actions of the EBCI before it ever owned the Subject Property. In other words, the EBCI did not purchase the Subject Property from Plaintiff-Appellant—it purchased it from a third party, (R p 34 ¶ 263), and Plaintiff-Appellant fails to explain how the ECBI's purchase of the Subject Property from a third party would operate to waive the Tribe's sovereign immunity as to any of her claims.

Furthermore, relying upon City of Sherrill, Plaintiff-Appellant argues that the Defendant-Appellees waived their sovereign immunity because they purchased the Subject Property on the open market in the manner of a private individual, and they did not follow the process of 25 U.S. Code § 465, that would grant them sovereign immunity over newly-acquired property. However, Plaintiff-Appellant's interpretation and application of the City of Sherill case fails for two primary reasons. First, she ignores the unique relationship between New York State and the tribes there, which is unlike the relationship between states and Indian tribes in most other

jurisdictions. Second, Plaintiff ignores the recent restatement in McGirt that practical considerations, like those unscrupulously employed in City of Sherill, are irrelevant in determining tribal jurisdictional issues. McGirt v. Oklahoma, ___U.S.___, 140 S. Ct. 2452 (2020) (holding that Muscogee (Creek) Nation reservation had never expressly been abrogated by Congress, resulting in over a million acres of Oklahoma including most of Tulsa being recognized as tribal jurisdiction).

The City of Sherill decision must be read within the context of the "the obvious fact that New York had legitimate and far-reaching connections with its Indian tribes antedating the Constitution and that the State has continued to play a substantial role with respect to the Indians in that State." Oneida Indian Nation of N. Y. State v. Oneida Cty., New York, 414 U.S. 661, 678 (1974); see United States v. Bryant, ___U.S.___, 136 S. Ct. 1954, 1968, (2016), as revised (July 7, 2016) (Thomas, J., Concurring) ("Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest."). Indeed, this relationship has been considered the exception to the rule within the world of Indian law because, notably unlike North Carolina,

> New York and federal authorities eventually reached partial agreement in 1948 when criminal jurisdiction over New York Indian reservations was ceded to the State. In addition, in 1950 civil disputes between Indians or between Indians and others were [Congressionally] placed within the jurisdiction of the state courts 'to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State.'

Id. at 679 (internal citations omitted). Nevertheless, the Supreme Court recognized that Indian issues are still fundamentally a matter of federal law, and it clarified that the "conclusion that this case arises under the laws of the United States is, therefore, wholly consistent with and in furtherance of the intent of Congress as expressed by its grant of civil jurisdiction to the State of New York with the indicated exceptions." Id. at 682. This unique Congressional intent in acknowledging the exceptional historical relationship between New York and the tribes there is the lens through which City of Sherill and other New York Indian law cases must be read.

Informed by that context, the Supreme Court's limited holding in City of Sherill should not be broadly applied beyond its facts or to non-New York tribes hastily, or indeed perhaps at all in the wake of McGirt. For instance, City of Sherill expressly relied heavily on the idea that the Supreme Court,

> has observed in the different, but related, context of the diminishment of an Indian reservation that '[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use,' may create 'justifiable expectations.' . . . 'jurisdictional history' and 'the current population situation ... demonstrat[e] a practical acknowledgment' of reservation diminishment; 'a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area'. . . . Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight here.

City of Sherrill, 544 U.S. at 215–16 (2005) (emphasis added). The Court even rationalized that such matters "cried out for a pragmatic approach." Id. at 211. However, this pragmatism concept was roundly rejected in the recent landmark case

of McGirt, where the Court clarified that such concerns and their related "dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand." McGirt, 140 S. Ct. at 2481 (2020). The majority in McGirt, which included City of Sherrill's author, Justice Ginsburg, held that concerning Tribal land matters,

> Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.
>
> . . . many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

McGirt, 140 S. Ct. at 2481–82 (2020). This is consistent with Justice Thomas' Indian land opinion in Nebraska v. Parker, 577 U.S. 481, 136 S. Ct. 1072 (2016), which found that "evidence of the changing demographics of disputed land is 'the least compelling' evidence" and "likewise has 'limited interpretive value.'" Id. at 1082. Both of these more recent holdings strike at the heart of the rationale in City of Sherill. To the extent City of Sherrill reasonably applies to non-New York Tribes, the foundation of its application here has been dissolved by McGirt and Parker.

In her brief, Plaintiff-Appellant argues that the EBCI's paying forms of state taxes is somehow relevant to this argument. However, "the tribe's immunity from suit" also precludes "the State from suing to collect unpaid taxes." Cayuga Indian

Nation of New York v. Seneca Cty., New York, 978 F.3d 829, 842 (2d Cir. 2020) (citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 514 (1991)); Bryan v. Itasca, 426 U.S. 373, 392 (1976) ("This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate (a tax) immunity and allow states to treat Indians as part of the general community.") (citation omitted); see also, United States v. Kagama, 118 U.S. 375, 383–84 (1886) ("These Indian tribes are the wards of the nation. . . . They owe no allegiance to the states and receive from them no protection."). Nevertheless, as a matter of sovereign comity, the EBCI has elected to pay taxes on Subject Property, but this fact is irrelevant to Plaintiff-Appellant's claims.

D. Neither the North Carolina Court of Appeals case of Sasser v. Beck nor the Treaty of New Echota are applicable in this case.

Plaintiff-Appellant's argument that North Carolina has jurisdiction over the Tribal Defendant-Appellees for these claims because of the 1835 Treaty of New Echota, as expressed in Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577 (1979), is a misapplication of Sasser and is inconsistent with North Carolina courts' historical and modern approaches and is superseded by federal case law to the contrary. According to Plaintiff-Appellant's reading of Sasser, the North Carolina Court of Appeals pronounced that the EBCI no longer had sovereign immunity at all, which is simply not the case. This Court already resolved this issue in Welch Contracting, Inc.,

among other cases. In the context of upholding the EBCI's sovereign immunity in Welch, this Court distinguished Sasser:

> Plaintiff relies on Sasser . . . for the proposition that the EBCI is subject to the jurisdiction of North Carolina courts. However, Sasser is distinguishable on its facts. In Sasser, a non-Indian minor, through his guardian ad litem, brought a tort action against an individual member of the EBCI, not the EBCI as an entity. The plaintiff sought to recover for personal injuries he sustained in a motel swimming pool owned by the defendant. Our Court held that the superior court had civil jurisdiction over the tort action against the individual member of the EBCI.

Id. at 55, 697. In the present case, Plaintiff-Appellant is suing the EBCI as an entity, and its agents working in their official capacity and, as such, the Court could not allow Plaintiff-Appellant's case to proceed without overruling Welch.

E. There are no valid "Immovable Property" or "In Rem Jurisdiction" exceptions to Tribal sovereign immunity.

Plaintiff-Appellant cites N.C. Gen. Stat. § 1-75.8 as the basis of in rem jurisdiction in this matter. However, under that statute, subject matter jurisdiction is a prerequisite for in rem jurisdiction: "[a] court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section." N.C. Gen. Stat. § 1-75.8 (2019) (emphasis added). Therefore, without pre-existing subject matter jurisdiction, this statute does not apply.

Furthermore, Tribal sovereign immunity is derived from the inherent sovereignty of Indian tribes, which predates even the U.S. Constitution. Bryant, 136 S. Ct. at 1962 (2016); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 58 (1978). In the past, the Supreme Court has always concluded that the scope of tribal sovereign

immunity is most coextensive with the scope of federal immunity, as opposed to foreign or state immunity. E.g., Kagama, 118 U.S. at 380 (1886) ("this power of congress to organize territorial governments, and make laws for their inhabitants, arises . . . from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else."); United States v. U. S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940) ("It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."); Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998) (discussing differences of foreign, tribal, and state sovereignty and ultimately dismissing off-reservation commercial contract claims due to tribal sovereign immunity).

It is a well-established principle that "there is no distinction between suits against the government directly, and suits against its property." The Siren, 74 U.S. 152, 154 (1868). Hence, sovereign immunity from suit bars claims against the sovereign's property. In United States v. Alabama, the Supreme Court held that state tax liens could not be enforced through a judicial sale of property subsequently purchased by the United States because "[a] proceeding against property in which the United States has an interest is a suit against the United States." 313 U.S. 274, 282 (1941). Indeed, the Supreme Court has repeatedly stated that federal sovereign immunity cannot be evaded by sleights of hand such as naming a governmental official or bringing an "in rem" action against government property. E.g., Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 280-86 (1983)

(dismissing North Dakota's suit seeking to quiet-title to federal lands that supposedly passed into state ownership under the equal-footing doctrine). If the government is the real party in interest, then sovereign immunity applies regardless of the named defendant. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687-88 (1949). A state-law classification of an action as "in rem" cannot determine federal land rights.

Consequently, tribal sovereign immunity precludes any action where the tribe is the real party in interest, such as where a lawsuit seeks to divest the tribe of ownership of real property. See, e.g., Lewis v. Clarke, ___U.S.___, 137 S. Ct. 1285, 1292 (2017) (concluding that "[t]here is no reason to depart from these general rules [of state and federal sovereign immunity] in the context of tribal sovereign immunity" and noting that regardless of the named defendant, the real question was whether the lawsuit would "require action by the sovereign or disturb the sovereign's property"). Tribal sovereign immunity is ultimately "a matter of federal law." Welch Contracting, Inc. v. N. Carolina Dep't of Transp., 175 N.C. App. 45, 53–54, 622 S.E.2d 691, 696–97 (2005) ("The Fourth Circuit has explicitly held that the right to sue the EBCI is dependent upon the explicit permission of Congress and that the principles of federal preemption apply."); State ex rel. Cooper v. Seneca-Cayuga Tobacco Co., 197 N.C. App. 176, 181, 676 S.E.2d 579, 583 (2009). The deeply rooted principle that a suit against the sovereign's property is a suit against the sovereign itself, therefore, applies to the Tribal Defendant-Appellees.

This Court need not endeavor to carve out a legally unsupported and ill-advised intrusion of tribal sovereign immunity. A primary purpose of sovereign immunity is to safeguard government property. That purpose has even greater significance for Indian tribes, which have far fewer resources than state and federal governments, and which already have been dispossessed of much of their land and resources. See Thebo v. Choctaw Tribe of Indians, 66 F. 372, 376 (8th Cir. 1895) (upholding tribal sovereign immunity while recognizing that the Choctaw Nation "would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to [bring] against it"); Wenona T. Singel & Matthew L.M. Fletcher, Power, Authority, and Tribal Property, 41 Tulsa L. Rev. 21, 49 (2005) ("Non-Indians, as private actors, lacking legal authorization, used brute physical power to dispossess Indian tribes of tribal lands in the nineteenth century. Similarly, non-Indians and government agents abused apparent legal authority to dispossess Indian lands. These avenues are no longer available to serve as tools for massive dispossession of tribal lands.").

Congress is the branch of government entrusted with plenary authority over Indian affairs and, therefore, Congress is the appropriate body to make the determinations on the competing policy concerns in matters such as this. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014). If and when Congress chooses to impair a tribe's sovereign authority, it must do so clearly—whether diminishing tribal sovereign territory, McGirt, 140 S. Ct. at 2482 (2020) (Congress may disestablish a reservation, but the Court "require[s] that Congress clearly express its

intent to do so") (citing Parker, 136 S. Ct. 1072 (2016)); or abrogating tribal sovereign immunity, Bay Mills, 572 U.S. at 790 (2014) (requiring Congress to " 'unequivocally' express" intent to abrogate sovereign immunity from suit); or abrogating tribal treaty rights, Herrera v. Wyoming, ___U.S.___, 139 S. Ct. 1686, 1698 (2019) ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'"). Congress routinely considers issues involving tribal sovereign immunity, yet it has chosen not to abrogate such immunity for Plaintiff-Appellant's claims in this matter.

If Plaintiff-Appellant's suit had been against a truly foreign nation or a sister state that had purchased real property in North Carolina, sovereign immunity would not have necessarily barred the suit. The immunity of foreign states—as discussed in greater detail above—is governed by the FSIA, 28 U.S.C. 1330, 1602 et seq., which provides a statutory exception to immunity in any case "in which rights. . . in immovable property. . . are in issue." 28 U.S.C. 1605(a)(4). Moreover, another State would not be entitled to immunity from a quiet-title action unless North Carolina granted that other State immunity. Nevada v. Hall, 440 U.S. 410, 416 (1979). The States surrendered their immunity with respect to one another by mutual concession at the Constitutional Convention. As Justice Scalia bluntly explained,

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

Blatchford v. Native Vill. of Noatak & Circle Vill., 501 U.S. 775, 782 (1991).

Tribal sovereignty, by contrast, is a "special brand of sovereignty" that "rests in the hands of Congress." Bay Mills, 572 U.S. at 790 (2014); U.S. Constitution, Article I, Section 8, Clause 3 (the "Indian Commerce Clause", identifying Indian tribes as a separate form of sovereign from states or foreign nations). Congress has not adopted an express immovable property exception to tribal sovereign immunity, like the one that applies to foreign states in the FSIA. Cayuga Indian Nation of New York v. Seneca Cty., New York, 978 F.3d 829, 840 (2d Cir. 2020) (after analyzing the FSIA and Upper Skagit Indian Tribe v. Lundgren, ___U.S.___, 138 S. Ct. 1649 (2018) and holding that tribal sovereign immunity prevents foreclosure action of tribal land, despite the County's "in rem exception" arguments). The complete absence of that Congressional waiver is controlling in this matter.

Indeed, when the Supreme Court was presented with an opportunity to recognize an extratextual "immovable property" or "in rem" exception to tribal sovereignty, the Court expressly declined to do so. Upper Skagit, 138 S. Ct. at 1654 (2018) ("in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question."); see In re Greektown Holdings, LLC, 917 F.3d 451, 462 (6th Cir. 2019), cert. dismissed sub nom., Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe, ___U.S.___, 140 S. Ct. 2638, (2020) (quoting Upper Skagit, "[i]t is the graveness of this question that led to the requirement that Congress unequivocally express its intent in order to abrogate tribal sovereign immunity. And that requirement reflects an enduring principle of Indian law: . . . courts will not lightly assume that Congress in fact intends

to undermine Indian self-government.'") (emphasis added); accord Hamaatsa, Inc. v. Pueblo of San Felipe, 2017-NMSC-007, ¶ 30, 388 P.3d 977, 986 ("We choose to follow the Second Circuit, and thereby refuse to recognize an exception to tribal sovereign immunity for in rem proceedings in light of the United States Supreme Court's holding in Bay Mills…"); Wisconsin Dep't of Nat. Res. v. Timber & Wood Prod. Located in Sawyer Cty., 2018 WI App 6, ¶ 47, 379 Wis. 2d 690, 719 (2018), review denied, Wisconsin Dep't of Nat. Res. v. Timber & Wood Prod. Located in Sawyer Cty., 2018 WI 92, 383 Wis. 2d 624 (2018) ("allowing in rem claims against tribal property to proceed 'would simply circumvent tribal sovereign immunity[,] allowing taking of tribal property.' Such a result would be contrary to one of the primary purposes of sovereign immunity—protecting tribal treasuries.") (internal citations omitted).

As the Supreme Court noted, a few state courts have created an "in rem" exception to tribal sovereign immunity. Upper Skagit, 138 S. Ct. at 1651 (2018). Those courts, however, did so prior to the significant Bay Mills tribal sovereignty reaffirmation and relied entirely upon the County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992) decision.[2] The Supreme Court took note of these state court opinions and explained that they were based on an incorrect reading of Yakima:

> Like some courts before it, the Washington Supreme Court read Yakima as distinguishing in rem from in personam lawsuits and "establish[ing] the principle that ... courts have subject-matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted." That was error. Yakima did not address the scope of tribal sovereign immunity.

[2] Compare Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp., 2002 ND 83, ¶ 17, 643 N.W.2d 685, 692, with Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wash. 2d 862, 869, 929 P.2d 379, 383 (1996).

Upper Skagit, 138 S. Ct. at 1652, (2018) (emphasis added). In so doing, the Supreme Court refuted the entire foundation upon which the state court "in rem" exceptions were built.

And yet, Plaintiff-Appellant is effectively requesting this Court to be, it appears, the first post-Upper Skagit state court to create this type of exception. Nevertheless, until Congress creates an unequivocal and express exception for in rem actions, as it has for foreign nations, Indian tribes remain immune from this type of suit. See e.g., Haile v. Saunooke, 246 F.2d 293, 297 (4th Cir. 1957) ("The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument."); In re Whitaker, 474 B.R. 687, 691 (B.A.P. 8th Cir. 2012) ("without congressional authorization, the Indian Nations are exempt from suit. Abrogation by Congress of sovereign immunity cannot be implied, but must be unequivocally expressed in explicit legislation."); Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 86 N.Y.2d 553, 561, 658 N.E.2d 989, 993 (1995) ("Importantly, to be valid, waivers of tribal sovereign immunity 'must be traceable to an official government action (statute, ordinance, resolution) that expressly and unequivocally waives immunity or empowers particular officers to waive immunity.'") (internal citation omitted).

II. IN THE ALTERNATIVE, THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT-APPELLEES BECAUSE SHE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A complaint is properly dismissed under 12(b)(6) "when one or more of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." Oates v. Jag, Inc., 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). The Court on a motion to dismiss cannot be required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. Strickland v. Hedrick, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008).

Plaintiff-Appellant put forth seven claims for relief in her complaint: 1) "Action in Rem Against Subject Property," 2) "Declaratory Judgment," 3) "Unfair and Deceptive Trade Practices," 4) "Civil Conspiracy," 5) "Piercing the Corporate Veil," 6) "Unjust Enrichment," and 7) "Injunction." (R pp 35-44). However, only three of Plaintiff-Appellant's claims are considered colorable, independent causes of action under North Carolina Law: 3) Unfair and Deceptive Trade Practices, 4) Civil Conspiracy, and 6) Unjust Enrichment. Plaintiff-Appellant's four other claims are not independent causes of action. An "action in rem" is a type of action or a type of subject matter jurisdiction that may be used to recover property. N.C. Gen. Stat. § 1-75.8 (2019) (statutory grounds for jurisdiction in rem). A declaratory judgment is a remedy a court can provide, but it is not a cause of action. N.C. Gen. Stat. § 1-253 (2019).

Piercing the corporate veil is not a theory of liability, but an avenue by which to bring a claim. Green v. Freeman, 367 N.C. 136, 146, 749 S.E.2d 262, 271 (2013). An injunction is also a remedy a court may provide, but it is not an independent claim or a cause of action. N.C. Gen. Stat. § 1-A1, Rule 65. Therefore, Plaintiff-Appellant's claims one, two, five, and seven must be dismissed for failing to state a claim upon which relief may be granted.

A. Plaintiff-Appellant has not stated a claim for Unfair and Deceptive Trade Practices.

Plaintiff-Appellant's claim of Unfair and Deceptive Trade Practices falls short because it is time barred and she fails to plead facts to support the necessary elements. Unfair and Deceptive Trade Practices claims must be brought within four years after the cause of action accrues. N.C. Gen. Stat. §§ 75-1.1, 75-16.2 (2019). The elements of a claim for Unfair and Deceptive Trade Practices are: 1) an unfair or deceptive act or practice, 2) in or affecting commerce, and 3) which proximately caused injury to the plaintiff. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 71-72, 653 S.E.2d 393, 399 (2007).

The four-year statute of limitations for Plaintiff-Appellant's claim began to run on July 23, 2013, and was over by the time the Complaint was filed in 2020. If an unfair and deceptive trade practice is continuous, then every additional week the practice continues is a separate offense, which extends the statute of limitations. N.C. Gen. Stat. § 75-8 (2019). However, the statute of limitations does begin to run when a defendant has completed a final overt act that relates back to the business relationship with the plaintiff. Richardson v. Bank of Am., N.A., 182 N.C. App. 531,

549-50, 643 S.E.2d 410, 422 (2007) (explaining that a loan closing was the overt act, and the statute of limitations began to run after the closing date even though the loan continued to exist). The Stop Work Order was the alleged "overt act" in this case and the statute of limitations began to run on July 23, 2013. Even though the Stop Work Order continued to exist (like a loan does after a loan closing) after July 2013, Plaintiff-Appellant has failed to plead any further, material "overt acts" by EBCI, so section 75-8 does not apply in this case.

Even if the Court were to look beyond the applicable statute of limitations, the Stop Work Order did not constitute an unfair or deceptive trade practice and Plaintiff-Appellant fails to allege any other unfair or deceptive practices as to Defendant-Appellees. "'A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' Marshall[v. Miller], 302 N.C. at 548, 276 S.E.2d at 403." Walker, 362 N.C. at 72, 653 S.E.2d at 399. Plaintiff-Appellant argues that EBCI "blocked" Plaintiff-Appellant from finishing the repairs on Bird Road through the issuance of the Stop Work Order because they were "aware" Plaintiff-Appellant was trying to open a commercial spring. (R p 38 ¶¶ 293-94). Plaintiff-Appellant points out that EBCI has a bottled water business. (R p 38 ¶ 292). However, Plaintiff-Appellant does not allege that EBCI participated in an unfair or deceptive business practice in its operation of its bottled water business, nor does she allege anything was illegal, immoral, unethical, or unscrupulous about the Stop Work Order. (R p 34 ¶ 265).

Plaintiff-Appellant does not allege sufficient facts to establish that Defendant-Appellees' alleged conduct was in or affecting commerce. The "statutory definition of commerce is expansive, [but] the Act is not intended to apply to all wrongs in a business setting." Hajmm Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 592-93 403 S.E.2d 483, 492-93 (1991) (also explaining when there is already a "legislative apparatus" in place to govern a particular area of law then the court should be careful not to create overlapping supervision). Plaintiff-Appellant alleges EBCI "hid behind enforcing environmental regulations" and because of the Stop Work Order, the EBCI now owns Subject Property. (R p 38 ¶ 302). The Stop Work Order was not alleged to be part of any commercial transaction; rather, the purpose of the Stop Work Order was to prevent soil erosion into Little Snowbird Creek. (R p 20 ¶ 143). The EBCI Office of Environment and Natural Resources Inspections Department, an agency that is separate from EBCI's commercial operations, issued the Stop Work Order. (R p 15 ¶ 98). Plaintiff-Appellant fails to connect the Stop Work Order directly to any business or commerce conducted by EBCI or, for that matter, directly to any business or commercial transaction at all. The hindrance to Plaintiff-Appellant's business activities came from Plaintiff-Appellant herself when she failed to comply with the recommendations from the Stop Work Order so that it could be lifted. (R p 20 ¶¶ 141-42). Furthermore, Plaintiff-Appellant listed Subject Property for sale a year before the Stop Work Order was issued, implying that Plaintiff-Appellant did not intend to obtain a contract with XYZ Bottling. (R p 10 ¶ 51a-f). Therefore, because the Stop Work Order was a directive issued strictly for environmental protection purposes,

and Plaintiff-Appellant had already listed Subject Property for sale, the Stop Work Order did not affect Plaintiff-Appellant's commercial activities.

The Stop Work Order was not the proximate cause of Plaintiff-Appellant's alleged injury. A plaintiff may not recover in an Unfair and Deceptive Trade Practices claim when "the complaint fails to demonstrate that the act of deception proximately resulted in some adverse impact or actual injury to the [plaintiff]." Walker v. Sloan, 137 N.C. App. 387, 399, 529 S.E.2d 236, 245 (2000) (citing Miller v. Ensley, 88 N.C. App. 686, 365 S.E.2d 11 (1988)). Proximate cause occurs "in a natural and continuous sequence, unbroken by any efficient intervening cause . . . ." State v. Ledford, 315 N.C. 599, 620, 340 S.E.2d 309, 323 (1986) (citing Black's Law Dictionary). No causal connection is sufficiently alleged to exist between the Stop Work Order and EBCI's purchase of the Subject Property from Westridge/Ellsworth. Plaintiff-Appellant listed Subject Property for sale a year before—and dropped the price to the ultimate sale price several months before—the Stop Work Order was issued. Furthermore, Westridge/Ellsworth purchased Subject Property from Plaintiff-Appellant. The only reason EBCI owns Subject Property now is because three years after Westridge/Ellsworth purchased Subject Property, they decided to sell it. (R p 34 ¶¶ 263, 270, 272). Westridge/Ellsworth's purchase of Subject Property is an intervening cause that severs any connection between Plaintiff-Appellant's sale of Subject Property and the EBCI's purchase of Subject Property. No causal connection exists between EBCI issuing the Stop Work Order to Plaintiff-Appellant and Westridge/Ellsworth's sale of Subject Property to EBCI in 2019.

B. Plaintiff-Appellant has not stated a claim for Civil Conspiracy.

Plaintiff-Appellant has failed to state a claim for civil conspiracy because the Complaint does not allege any actual agreement between Westridge/Ellsworth and EBCI and does not allege any unlawful acts. The elements of conspiracy are 1) an agreement, 2) between two or more individuals, 3) to do an unlawful act (or a lawful act in an unlawful manner), and 4) there was injury as a result of the conspiracy. Strickland v. Hedrick, 194 N.C. App. 1, 19, 669 S.E.2d 61, 72 (2008) (citing Privette v. University of North Carolina, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989)). To meet the threshold for a proper pleading for civil conspiracy, a plaintiff must allege an actual agreement between co-conspirators. See Dove v. Harvey 168 N.C. App. 687, 690-91, 608 S.E.2d 798, 801 (2005) (dismissal of civil conspiracy proper when even though plaintiff's defense counsel and the prosecutor were having an affair, plaintiff failed to allege that there was an agreement between the prosecutor and plaintiff's defense counsel to sabotage plaintiff's defense). "It is well established that 'there is not a separate civil action for civil conspiracy in North Carolina.'" Esposito v. Talbert & Bright, Inc., 181 N.C. App. 742, 747, 641 S.E.2d 695, 698 (2007) (citing Dove v. Harvey 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005)). A claim for civil conspiracy can only be successful if a plaintiff successfully, correctly, and sufficiently pleads a claim that alleges actual unlawfulness so as to show a wrongful act in furtherance of the conspiracy. Krawiec v. Manly, 370 N.C. 602, 614-15, 811 S.E.2d 542, 550-52 (2018).

In the Complaint, Plaintiff-Appellant failed to allege any actual agreement between Westridge/Ellsworth and EBCI. Plaintiff-Appellant claims, "that the EBCI Defendants and others were conspiring to make the maintenance, grading, and the slide repair to Plaintiff's established access roads (Bird Road Easement and Teesateskie Easement for Right-of-Way) impossible for Plaintiff and Plaintiff's family, which led to Defendant EBCI obtaining Subject Property on August 15, 2019." (R p 40 ¶ 312) (emphasis added). Plaintiff-Appellant does not actually allege with whom EBCI supposedly conspired, and a conspiracy requires at least two parties. Additionally, Plaintiff-Appellant claims "that the EBCI Defendants were conspiring to obtain Subject Property well before they issued the Stop-Work Order. Plaintiff believes that the conspiracy went back to when Graham County was first beginning to fabricate a tax bill." (R p 40 ¶ 319). The Complaint does not contain any allegations of agreements made between EBCI and Graham County, nor between EBCI and Westridge/Ellsworth. Although Plaintiff-Appellant attempts to show a connection from EBCI's purchase of Subject Property back to the Stop Work Order, no logical connection can be established. (R p 34 ¶¶ 263-272). Even if EBCI had wanted to obtain Subject Property from Plaintiff-Appellant in 2013, they could have done so without the Stop Work Order because Subject Property had already been on the market for a year. (R p 10 ¶¶ 51a-f). The price had even been decreased from $6.25 million to $2.6 million. Id. If EBCI had really wanted to take Subject Property from Plaintiff-Appellant, then it could have done so in 2013. There was no reason to wait for Subject Property to be sold to Westridge/Ellsworth and then also wait to purchase

it from Westridge/Ellsworth in 2019 for $622,000 more than what EBCI could have bought Subject Property for in 2013. (R p 34 ¶ 270). The Complaint does not allege any facts that would tend to show that EBCI conspired with Westridge/Ellsworth to take Subject Property from Plaintiff-Appellant.

Plaintiff-Appellant failed to allege any unlawful act on behalf of EBCI. Plaintiff-Appellant alleges unfair and deceptive trade practices and unjust enrichment but does not present facts to support those claims. Plaintiff-Appellant cannot successfully plead a claim of conspiracy if there is no underlying unlawful act. Furthermore, even if Plaintiff-Appellant had stated a claim for unfair and deceptive trade practices, unjust enrichment, or even duress, the statute of limitations on all three had run by the time Plaintiff-Appellant filed her Complaint. Therefore, Plaintiff-Appellant failed to state a claim for civil conspiracy.

C. Plaintiff-Appellant has not stated a claim for Unjust Enrichment.

Plaintiff-Appellant has failed to state a claim for unjust enrichment because Plaintiff-Appellant never conferred a benefit to EBCI. The elements of unjust enrichment require that: 1) one party confer a benefit on another party, 2) the benefit was not conferred officiously (e.g., benefit must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances), 3) the benefit was not gratuitous, 4) the benefit is measurable, and 5) the defendant consciously accepted the benefit. JPMorgan Chase Bank, N.A. v. Browning, 230 N.C. App. 537, 541-42, 750 S.E.2d 555, 559 (2013). The statute of limitations for an unjust enrichment claim is three years. N.C. Gen. Stat. § 1-52(1) (2019); Housecalls Home

Health Care, Inc. v. State, 200 N.C. App. 67, 70, 682 S.E.2d 744, 744 (2009) (an action to recover in unjust enrichment is an action in implied contract so the statute of limitations in § 1-52(1) applies). "[T]o prevail on a claim of unjust enrichment, a plaintiff must show that 'property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received.'" Butler v. Butler, 239 N.C. App. 1, 7, 768 S.E.2d 332, 337 (2015) (citing Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000), disc. review denied, 353 N.C. 378, 547 S.E.2d 13 (2001)).

Plaintiff-Appellant never conferred a benefit to EBCI. Plaintiff-Appellant sold Subject Property to Westridge/Ellsworth in 2016 and then three years later Westridge/Ellsworth sold Subject Property to EBCI. (R p 21 ¶ 171, p 34 ¶ 263). The fact that there is a third party in between the transfers of Subject Property from Plaintiff-Appellant to EBCI makes an unjust enrichment claim impossible. EBCI purchased Subject Property from a third party and, therefore, had no legal or equitable obligation to Plaintiff-Appellant to account for EBCI's purchase of Subject Property in 2019. Furthermore, Plaintiff-Appellant and EBCI never had any type of implied contract, and therefore Plaintiff-Appellant could not recover Subject Property based on a claim of unjust enrichment. Even if the court found an implied contract, the statute of limitations began to run back in 2013 and Plaintiff-Appellant did not bring her claim until 2020; therefore, it is time barred.

D. Plaintiff-Appellant has not stated a claim for Duress.

Plaintiff-Appellant has failed to state a claim for duress. Although it is not specifically plead, Plaintiff-Appellant makes many allegations of "extreme duress" throughout her seven claims. (R pp 36-42 ¶¶ 286b, 297, 303, 305, 317, 334). "'Duress exists where one, by unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will.'" Radford v. Keith, 160 N.C. App. 41, 43-44, 584 S.E.2d 815, 817 (2003) (citing Smithwick v. Whitley, 152 N.C. 366, 371, 67 S.E. 913, 914 (1910)). The statute of limitations for duress is three years. N.C. Gen. Stat. § 1-52(9) (2019); Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 156, 113 S.E.2d 270, 277-76 (1960) (explaining that § 1-52(9) is the applicable statute of limitations for duress because duress is a form of fraud).

Plaintiff-Appellant's Complaint is focused on EBCI's Stop Work Order as one of the main causes of the "extreme duress" she was under when she sold Subject Property. (R p 29 ¶¶ 221-26, p 33 ¶¶ 253-55). If that is true, then the statute of limitations on Plaintiff-Appellant's claim began to run in 2013 and ran out before she filed this complaint in 2020.

Furthermore, Plaintiff-Appellant claims that the duress from the Stop Work Order (along with her tax issues) was so great it forced her to sell Subject Property to Westridge/Ellsworth. (R p 31 ¶ 255). However, Plaintiff-Appellant then admits that, although she was purportedly under "relentless, extreme duress from the EBCI Defendants, and also by Phillips, Ledwell, and Graham County . . . even under this

duress, [Plaintiff-Appellant] was not willing to extend the contract any further under the current terms, so Defendant Ellsworth agreed, in exchange for an extension, to make payments that did not reduce the principal, and these were called non-refundable due diligence payments." (R p 25 ¶ 193). This illustrates that Plaintiff-Appellant mistakes her situation for duress. A person under actual duress is forced to do something against her free will. Radford, 160 N.C. App. at 43-44, 67 S.E.2d at 817. Plaintiff-Appellant, on the other hand, demonstrates by her own verbiage (i.e., "not willing") that she was not forced to do anything, and she even negotiated more money out of the sale in the form of extended and non-refundable due diligence payments. (R p 25 ¶ 193).

In summary, Plaintiff-Appellant's Complaint seems to boil down to a claim for "seller's remorse"; however, there is no such claim under North Carolina law. Based on the foregoing, it is clear that the Complaint on its face reveals that no law supports Plaintiff-Appellant's claims, there is an absence of fact sufficient to make a good claim, and Plaintiff-Appellant disclosed facts in the Complaint that defeat Plaintiff-Appellant's claims. Oates v. Jag, Inc., 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). Therefore, Plaintiff-Appellant's Complaint should be dismissed pursuant to Rule 12(b)(6) of North Carolina Rules of Civil Procedure for failing to state a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons, Defendant-Appellees respectfully request that this Court affirm the trial court's dismissal of Plaintiff-Appellee's claims against them.

Respectfully submitted this 4th day of August, 2021.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for the Defendant-Appellees certifies that the foregoing brief, contains less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

This the 4th day of August, 2021,

VAN WINKLE, BUCK, WALL, STARNES AND DAVIS, P.A.

By: /s/ Dale A. Curriden
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this date served a copy of the foregoing DEFENDANT-APPELLEE'S BRIEF in the above-entitled action upon:

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