

No. COA25-1163

THIRTY-NINTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Kings Mountain Land
Development Partners, LLC,

Plaintiff-Appellant,

v.

From Cleveland County

Catawba Indian Nation,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S BRIEF

INDEX

TABLE OF CASES AND AUTHORITIES	iii
ISSUE PRESENTED.....	2
INTRODUCTION	2
STATEMENT OF THE CASE.....	5
STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW.....	6
STATEMENT OF THE FACTS.....	8
A. Factual background.....	9
B. Procedural background	18
STANDARD OF REVIEW	20
ARGUMENT	21
I. The trial court erred when it held that sovereign immunity bars, in whole or in part, KMLD’s claims for conversion, trespass, unfair and deceptive trade practices, and injunctive relief.....	21
A. The trial court misinterpreted the waiver provisions in the parties’ contracts.....	22

1.	The trial court’s interpretation is inconsistent with the ordinary meaning of the contract language and with appellate precedent	23
2.	The court also violated established rules of contract interpretation	29
B.	The Tribe has waived its immunity for all of KMLD’s claims	32
1.	KMLD’s claims for trespass and conversion fall within the sovereign immunity waivers	33
2.	KMLD’s claim for unfair and deceptive trade practices also falls within the sovereign immunity waivers.....	38
3.	KMLD’s claim for injunctive relief falls within the sovereign immunity waivers as well	42
	CONCLUSION	43
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	
	APPENDIX	
	ADDENDUM	

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ajuba Int’l, LLC v. Saharia</i> , 871 F. Supp. 2d 671 (E.D. Mich. 2012).....	22
<i>AQuate II LLC v. Myers</i> , 100 F.4th 1316 (11th Cir. 2024)	27, 28, 37, 38
<i>Ballard v. Shelley</i> , 257 N.C. App. 561, 811 S.E.2d 603 (2018)	6
<i>Banc of Am. Sec. LLC v.</i> <i>Evergreen Int’l Aviation, Inc.</i> , 169 N.C. App. 690, 611 S.E.2d 179 (2005)	8
<i>Bank of Am., N.A. v. Rice</i> , 244 N.C. App. 358, 780 S.E.2d 873 (2015)	8
<i>Bates v. Charlotte-Mecklenburg Hist.</i> <i>Landmarks Comm’n</i> , 292 N.C. App. 1, 897 S.E.2d 1 (2024)	20
<i>Bigelow v. Town of Chapel Hill</i> , 227 N.C. App. 1, 745 S.E.2d 316 (2013)	8, 20
<i>C & L Enters. v. Citizen Band Potawatomi</i> <i>Indian Tribe of Okla.</i> , 532 U.S. 411 (2001).....	21, 38
<i>Can Am S., LLC v. State</i> , 234 N.C. App. 119, 759 S.E.2d 304 (2014)	7
<i>Canady v. Mann</i> , 107 N.C. App. 252, 419 S.E.2d 597 (1992)	39

<i>CDC Pineville, LLC v. UDRT of N.C., LLC</i> , 174 N.C. App. 644, 622 S.E.2d 512 (2005)	33
<i>Cline v. James Bane Home Bldg., LLC</i> , 278 N.C. App. 12, 862 S.E.2d 54 (2021)	6
<i>Coregis Ins. Co. v. Am. Health Found.</i> , 241 F.3d 123 (2d Cir. 2001)	26, 27
<i>Edwards v. Hill</i> , 208 N.C. App. 178, 703 S.E.2d 452 (2010)	33
<i>Est. of Harvey v. Kore-Kut, Inc.</i> , 180 N.C. App. 195, 636 S.E.2d 210 (2006)	7
<i>Everhart v. O’Charley’s, Inc.</i> , 200 N.C. App. 142, 683 S.E.2d 728 (2009) ...	25, 26, 28
<i>FS Med. Supplies, LLC v. TannerGap</i> , No. 3:21-cv-501, 2023 U.S. Dist. LEXIS 177299 (W.D.N.C. Sept. 30, 2023).....	22, 26
<i>Hamby v. Profile Prods., L.L.C.</i> , 361 N.C. 630, 652 S.E.2d 231 (2007).....	7
<i>Hemric v. Groce</i> , 169 N.C. App. 69, 609 S.E.2d. 276 (2005)	30
<i>Huffington v. T.C. Grp.</i> , 637 F.3d 18 (1st Cir. 2011)	27
<i>Hughes v. Bd. of Trs. Teachers’ & State Employees’ Ret. Sys.</i> , 296 N.C. App. 478, 909 S.E.2d 697 (2024)	20
<i>Jones-Phillips Co. v. McCormick</i> , 174 N.C. 82, 93 S.E. 449 (1917).....	31

<i>Kiowa Tribe of Okla. v. Mfg. Techs., Inc.</i> , 523 U.S. 751 (1998).....	21
<i>Marcoin, Inc. v. McDaniel</i> , 70 N.C. App. 498, 320 S.E.2d 892 (1984)	31
<i>Martin v. Martin</i> , 26 N.C. App. 506, 216 S.E.2d 456 (1975)	30
<i>McGladrey, Hendrickson & Pullen v.</i> <i>Syntek Fin. Corp.</i> , 98 N.C. App. 151, 389 S.E.2d 636 (1990)	34
<i>Mosley & Mosley Builders, Inc. v. Landin, Ltd.</i> , 97 N.C. App. 511, 389 S.E.2d 576	39
<i>Post v. Avita Drugs, LLC</i> , 2017 NCBC 93 (N.C. Super. Ct. Oct. 11, 2017).....	41
<i>Schenk v. HNA Holdings, Inc.</i> , 170 N.C. App. 555, 613 S.E.2d 503 (2005)	26
<i>SciGrip, Inc. v. Osae</i> , 373 N.C. 409, 838 S.E.2d 334 (2020).....	39
<i>State ex rel. Stein v. Kinston Charter Academy</i> , 379 N.C. 560, 866 S.E.2d 647 (2021).....	20
<i>Taha v. Thompson</i> , 120 N.C. App. 697, 463 S.E.2d 553 (1995)	38
<i>Unifour Constr. Servs. v. Bellsouth Telcoms.</i> , 163 N.C. App. 657, 594 S.E.2d 802 (2004)	40
<i>WakeMed v. Surgical Care Affiliates, LLC</i> , 243 N.C. App. 820, 778 S.E.2d 308 (2015)	22

Whitaker v. Monroe Staffing Servs., LLC,
42 F.4th 200 (4th Cir. 2022) 27

Statutes

N.C. Gen. Stat. § 1-277(a)..... 6
N.C. Gen. Stat. § 1-277(b)..... 6, 7
N.C. Gen. Stat. § 1D-15(a) 25
N.C. Gen. Stat. § 7A-27(b)(3)..... 6

Other Authorities

1 Noel Allen, North Carolina Unfair Business
Practice (2025) 38
Black’s Law Dictionary (12th ed. 2024) 23, 24
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(1968) 26

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PLAINTIFF-APPELLANT'S BRIEF

ISSUE PRESENTED

Plaintiff-Appellant Kings Mountain Land Development Partners, LLC (“KMLD”) and Defendant-Appellee Catawba Indian Nation (“the Tribe”) entered into multiple agreements to facilitate the Tribe’s construction of a new casino. Each agreement contains a broad waiver of the Tribe’s sovereign immunity. Did the trial court err by holding that the Tribe is immune, in whole or in part, from several of KMLD’s claims in this case?

INTRODUCTION

KMLD owns a tract of land in Cleveland County, North Carolina. (R pp 4, 7) This tract surrounds a parcel of land held in trust for the Tribe by the U.S. government (“the Trust Land”). (R pp 7, 9, 25)

To facilitate the Tribe’s construction of a new casino on the Trust Land, KMLD transferred part of its own land to the Tribe and made three agreements with the Tribe. (R pp 8-9) Two of those agreements granted easements that allowed the Tribe to access KMLD’s remaining land for certain construction-related purposes. (R pp 8-9, 27-40, 42-60) The third agreement imposed a restrictive covenant on the land that KMLD transferred to the Tribe. (R pp 8-9, 62-74)

In each agreement, so that KMLD could protect its property and its rights, the Tribe waived its sovereign immunity for “any claim” that is “directly or indirectly related to [the] Agreement or any transactions contemplated [t]hereunder,” whether “arising as a matter of contract or a tort.” (R pp 4, 30-31, 47-48, 66-67)

In connection with the Tribe’s construction of its casino, the Tribe and its contractors (who acted on behalf of and at the instruction of the Tribe) soon began construction activities on KMLD’s land, exceeding the parameters of the easements, and violating KMLD’s property rights. (R pp 3, 5, 9-11, 13-16) The Tribe engaged in this conduct to save time during construction so that it could begin full casino operations sooner and thus substantially increase its revenue and profits. (R pp 3, 5, 13, 16-18; Doc. Ex. 246)

KMLD filed multiple tort and contract claims against the Tribe. (R pp 18-21) Even though the Tribe explicitly waived sovereign immunity for both contract and tort claims, the trial court held that the Tribe remains immune from all of KMLD’s tort claims, in whole or in part. (R pp 134-35) The court reasoned that the tort claims are not “related to” the parties’ agreements or the transactions that those agreements

contemplate, because the claims (1) allegedly do not have a “logical or causal connection” to those agreements, and (2) are not “based on the express rights and restrictions” in the agreements. (R pp 134-35)

That reasoning is erroneous. The court’s interpretation ignores both the ordinary meaning of the term “related to” and this Court’s governing precedent interpreting that term. The court’s interpretation also violates bedrock principles of contract interpretation. For example, by limiting the waiver provisions to claims that are based on the agreements’ express rights and restrictions, the court made multiple parts of those provisions meaningless, including their explicit inclusion of tort claims.

The contractual waivers of the Tribe’s immunity sweep broadly: Each waiver covers all claims that have some connection, even an indirect one, either to the parties’ agreements or to the transactions that those agreements contemplate. The waivers cover all of KMLD’s claims in this case. For example, KMLD has claims for trespass and conversion that, at a minimum, relate to the parties’ easement agreements because the validity of these claims depends on whether the easements authorized the Tribe’s conduct on KMLD’s land. In addition, all of KMLD’s claims arise because the Tribe violated KMLD’s property rights when

constructing its casino. Thus, the claims relate to a transaction contemplated by the agreements: the casino construction.

For these reasons, the Tribe waived its immunity for all of KMLD's claims. The trial court's contrary holding should be reversed.

STATEMENT OF THE CASE

KMLD filed this action against the Tribe for trespass, conversion, unfair and deceptive trade practices, injunctive relief, and breach of easement agreements. (R pp 18-21) The Tribe filed a partial motion to dismiss and for judgment on the pleadings under Rules 12(b)(2) and 12(c) of the North Carolina Rules of Civil Procedure. (R p 128) The Tribe sought dismissal of all of KMLD's claims, except the breach of easement claims, based on sovereign immunity. (R pp 128-29)

After a hearing, the trial court granted the Tribe's motion. (R p 135) The court dismissed KMLD's conversion claim in full. (R p 135) It dismissed KMLD's claims for trespass, unfair and deceptive trade practices, and injunctive relief except to the extent those claims are "based on the express rights or restrictions" in the agreements. (R pp 134-35)

KMLD filed a timely notice of appeal of the trial court's order. (R p 136)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction over this appeal for three independent reasons.

First, the trial court's order is immediately appealable because, as a ruling on sovereign immunity, it affects KMLD's substantial rights that would be lost or inadequately protected absent an immediate appeal. *See* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3). This Court has held that an order granting a partial motion to dismiss based on sovereign immunity affects the plaintiff's substantial rights and is thus immediately appealable. *See, e.g., Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605-06 (2018); *Cline v. James Bane Home Bldg., LLC*, 278 N.C. App. 12, 16-18, 862 S.E.2d 54, 59-60 (2021). Under these decisions, the trial court's order affects KMLD's substantial rights.

Second, the order is immediately appealable as an adverse ruling on personal jurisdiction. *See* N.C. Gen. Stat. § 1-277(b). This Court has held that sovereign immunity is a matter of personal jurisdiction. *See, e.g., Can Am S., LLC v. State*, 234 N.C. App. 119, 123-24, 759 S.E.2d 304,

308 (2014). As a result, when a defendant moves to dismiss under Rule 12(b)(2) based on sovereign immunity, a ruling on that motion is immediately appealable under section 1-277(b). *See id.* Here, the Tribe moved to dismiss under Rule 12(b)(2) based on sovereign immunity, and the trial court granted the motion. (R pp 128-29, 135)

Finally, the trial court's order is also immediately appealable under the substantial right doctrine because it creates a risk of inconsistent verdicts. An order affects a substantial right when it could produce multiple trials on the same factual issue, creating a possibility of inconsistent verdicts on that issue. *See, e.g., Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 634, 652 S.E.2d 231, 234 (2007); *Est. of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006). The order here does just that. The claims that the trial court dismissed and the claims that remain pending have significant factual overlap: They all involve the Tribe's conduct in entering KMLD's land and violating KMLD's property rights. (R pp 3-6, 9-11, 13-15) Because of this factual overlap, holding separate trials on these claims could generate inconsistent verdicts.

For these reasons, this Court has jurisdiction over this appeal.

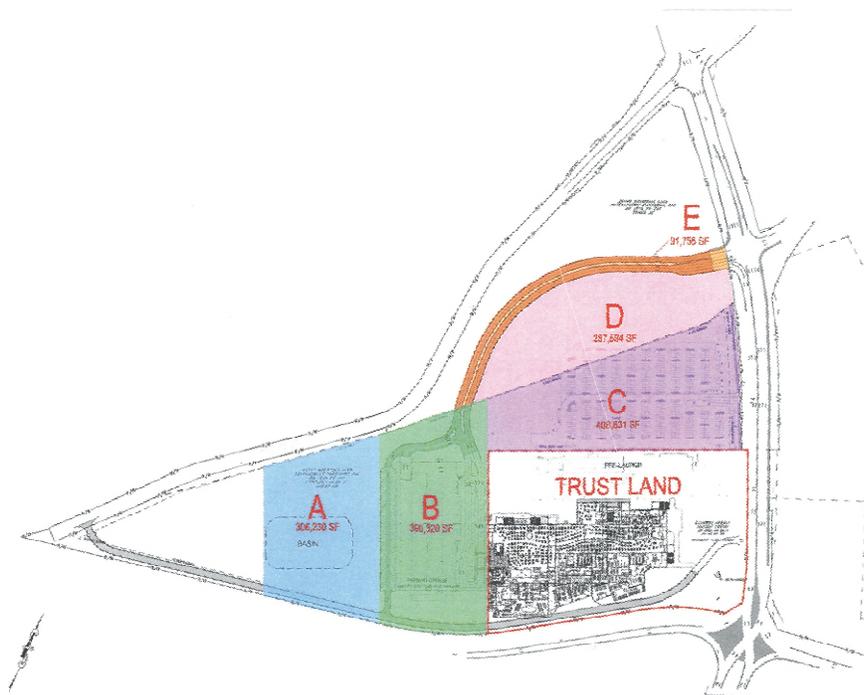
STATEMENT OF THE FACTS

As the following statement of the facts reflects, on a Rule 12(c) motion, a court may consider the allegations in the complaint, any documents attached to and incorporated into the complaint, and any allegations in the answer that support the plaintiff. *See, e.g., Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 4, 745 S.E.2d 316, 320 (2013); *Bank of Am., N.A. v. Rice*, 244 N.C. App. 358, 369-70, 780 S.E.2d 873, 882 (2015). In addition, on a Rule 12(b)(2) motion, a court may consider evidence submitted by the parties. *See Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693-94, 611 S.E.2d 179, 182-83 (2005).

Here, KMLD attached multiple documents to its complaint and incorporated those documents into the complaint. (R pp 8-10, 12-16, 24-107) Additionally, KMLD submitted its verified responses to the Tribe's Second Set of Interrogatories to the trial court in response to the Tribe's Motion to Dismiss under Rule 12(b)(2). (Doc. Ex. 243-54) Under the above decisions, these documents are all properly before the Court.

A. Factual background

Before 2020, KMLD owned about 67 acres of land located just north of Interstate 85 and just west of Dixon School Road and Kings Mountain Boulevard. (R pp 4, 7) This land is shown in the Area Map attached to the complaint as Exhibit A (R p 25):



KMLD and its parent entity, Kings Mountain Sky Boat Partners, LLC (“KMSB”), worked with the Tribe for over a decade to facilitate development of a casino on part of this land. (R pp 4, 7)

In 2018, the Tribe agreed to buy a parcel of about 17 acres, called the Trust Land on the Area Map. (R p 7) The U.S. government took title to this parcel in trust for the Tribe's benefit. (R p 7) KMLD kept the rest of the land, including the adjacent 9.4 acres called Parcel C. (R p 7)

In 2020, the Tribe obtained federal approval to build a casino on the Trust Land. (R p 7) The Tribe then opened a temporary casino on that parcel in a series of trailers. (R p 7)

KMSB and the Tribe had planned to build a new casino together, but the National Indian Gaming Commission did not approve those plans. (R p 4) As a result, KMSB and the Tribe entered into a Payment Agreement to compensate KMSB and its affiliates for use of the surrounding land and KMSB's efforts to establish the Tribe's casino. (R p 4)

After the agreement's terms were finalized, however, new leadership within the Tribe refused to honor the agreement and pay KMSB unless KMLD and its affiliates agreed to sell Parcel C to the Tribe. (R pp 4-5, 7-8) Parcel C was being used at the time as a surface parking lot for the temporary casino. (R p 7)

After months of negotiations, KMLD agreed to transfer Parcel C to the Tribe and grant easements to the Tribe for limited use of KMLD's remaining land for the Tribe's construction of a new casino. (R p 8) These agreements were based on the Tribe's representation that it would respect KMLD's property rights and would communicate in good faith to protect KMLD's future development needs. (R p 8) The Tribe also told KMLD that the Tribe would cooperate and coordinate with KMLD to allow KMLD and its affiliates to construct and operate a permanent multi-level parking garage on its property adjacent to, and with access to, the new casino. (R p 8; Doc. Ex. 247-48) In connection with this oral representation, the Tribe agreed that it would enter into a restrictive covenant forbidding the construction of a multi-level parking facility on Parcel C. (R p 5; Doc. Ex. 247-48)

Unbeknownst to KMLD, the Tribe's representations that the multi-story parking deck for the casino would be built on KMLD's property and operated by KMLD or an affiliated entity were false. (Doc. Ex. 247-48) In fact, the Tribe was secretly working with its architect to design a casino that included a multi-level parking deck on the Trust Land. (Doc. Ex. 248)

Based on the Tribe's misrepresentations, KMLD entered into a Real Estate Purchase Agreement with the Tribe in February 2024. (R p 8; Doc. Ex. 247-48) Pursuant to this agreement, the parties did the following:

- KMLD transferred Parcel C to the Tribe. (R p 8)
- KMLD granted the Tribe a Temporary Construction Easement. This easement gave the Tribe limited access to certain parts of KMLD's land for certain construction activities. (R pp 8, 27-40)
- KMLD and the Tribe entered into an Easement Agreement. (R p 8) This agreement also granted the Tribe an easement that allowed access to KMLD's land for certain construction activities, including access to install utilities and a stormwater system in a defined location on that land (with prior notice to KMLD and subject to KMLD's approval). (R pp 8, 42-60) (This brief refers to the Temporary Construction Agreement and the Easement Agreement together as the "easement agreements.")

- KMLD and the Tribe entered into a Restrictive Covenant that prohibited the Tribe from constructing or operating a multi-level parking structure or parking garage on Parcel C for 25 years. (R pp 8-9, 62-74)¹

The Temporary Construction Easement, Easement Agreement, and Restrictive Covenant each contain a materially identical provision entitled “Limited Waiver of Sovereign Immunity.” (R pp 30-31, 47-48, 66-67) This provision states, in pertinent part, as follows:

Grantee, on behalf of itself, each of its affiliates, and any of their respective successors and assigns (each, a “Tribal Party”), hereby **expressly and irrevocably grants to each KMLDP² Party a limited waiver of its sovereign immunity from suit or other legal process with regard to any claim or action that is directly or indirectly related to this Agreement or any transactions contemplated hereunder, whether any such claim or action arises under law or in equity, whether arising as a matter of contract or a tort, whether seeking monetary damages, injunctive or declaratory relief or other remedies, and whether arising during or after the expiration or termination of this Agreement** (each, a “Claim”), and waives all defenses based thereon with respect thereto; provided that such limited waiver of sovereign

¹ KMLD attached the Temporary Construction Easement, the Easement Agreement, and the Restrictive Covenant to its Complaint and incorporated those documents by reference. (R pp 8-9, 24-74)

² “KMLDP” is Kings Mountain Land Development Partners, LLC. (R pp 27, 62).

immunity: (a) is limited in duration to the statute of limitations provided under the laws of the State of North Carolina ... (b) is granted solely to the KMLDP Parties; and (c) shall in no event permit recourse against [certain assets].³

(R pp 30-31, 47-48, 66-67) (emphasis added))

After the February 2024 conveyances, KMLD still owned the KMLD Tract: about 40 acres of land that includes Parcels A, B, D, and E and the area to the west of Parcel A on the Area Map. (R p 9)

In May 2024, contrary to its prior representations to KMLD, the Tribe announced publicly that its permanent casino would include a multi-level parking facility on the Trust Land. (R pp 5, 9) This announcement materially diminished the value of the KMLD Tract, including its value as a location for a permanent parking garage for the new casino. (R p 9)

In May and June 2024, KMLD's counsel emailed the Tribe multiple times to coordinate the construction activities on KMLD's land

³ There are some very minor non-substantive differences in the language of the three waivers. For example, in the Easement Agreement, KMLD is described as "Grantor" instead of "KMLDP." (R pp 42, 47-48) It is undisputed that (1) any differences in the language are immaterial to this appeal, and (2) the language setting forth the scope of the sovereign immunity waivers is identical in the three agreements.

contemplated by the easement agreements. (R pp 12-13, 82-83, 85-86)

The Tribe did not respond. (R p 12)

In July 2024, KMLD's counsel emailed the Tribe again. (R pp 12, 88-92). Counsel pointed out that there had been "absolutely no communication about what activities are occurring with regards to either easement." (R pp 12, 88-89) He also pointed out that numerous activities had been observed on KMLD's land that the easements did not allow, including construction parking on Parcels A and B, construction activities throughout KMLD's property and well beyond the designated areas, and the movement of large quantities of dirt and rock. (R pp 12-13, 88) Counsel also noted that the Tribe had not satisfied its obligations under the easements to submit stormwater and utility plans for KMLD's approval and to provide insurance verification. (R pp 12-13, 88)

Later in July, KMLD's counsel met with the Tribe and its contractors on the construction project site. (R pp 13, 94) During this meeting, counsel observed numerous activities by the Tribe and its contractors on KMLD's property that were unauthorized and exceeded the scope of the easements. (R p 13) In a letter the next day, KMLD's counsel enumerated these unauthorized activities and demanded that

the Tribe stop them immediately. (R pp 14-15, 101-04) These activities included the following:

- Using KMLD's land without regard for property lines and easement boundaries.
- Storing construction materials, construction equipment, trash, and debris throughout KMLD's land.
- Creating unauthorized roads throughout KMLD's land, parking on that land, and generally using the land at will to access the Trust Land and facilitate casino construction.
- Running multiple dump trucks at the same time to take rock and earth from KMLD's land and use it for construction on the Tribe's land.
- Grading and moving earth throughout KMLD's land.
- Building a fuel dump on KMLD's land.

(R pp 14, 102-03)

In sum, the Tribe and its contractors (who acted at the Tribe's direction and on its behalf) were ignoring the parameters of the easement agreements with KMLD, trespassing over KMLD's property, and using that property as if it belonged to the Tribe. (R pp 3, 5-6, 9-11, 14, 102-03)

The Tribe engaged in this conduct to save time during construction so that it could begin full casino operations sooner and thus substantially increase its revenue. (R p 3; Doc. Ex. 246)

This conduct by the Tribe has, in turn, significantly devalued KMLD's land. (R p 3; Doc. Ex. 246-47) Among other things, the Tribe has removed rocks and soil and has graded and sloped KMLD's property in ways that have caused KMLD to lose substantial developable land. (R p 3; Doc. Ex. 246-47) For example, the Tribe regraded parts of KMLD's Parcel D to avoid the need to build a retaining wall, reducing KMLD's developable acreage and saving the Tribe at least \$1 million. (R p 10)

After KMLD sent its cease-and-desist letter to the Tribe, the Tribe made additional misrepresentations to KMLD and tried to conceal its misconduct. (R pp 15-16; Doc. Ex. 249-50) For example, the Tribe said that muddy conditions prevented it and its contractors from removing unauthorized construction equipment from KMLD's property. (R p 15) In fact, when KMLD's counsel visited the property the next day, there was no mud on the site, and the Tribe's contractors were operating cranes and equipment on KMLD's land to install the final footers and pilings for the

new casino, all in violation of KMLD's prior instructions to stop further unauthorized use of its property. (R pp 15-16; Doc. Ex. 249)

The Tribe also stated in writing to KMLD that the Tribe's stormwater system had been installed inside the boundaries set by the Easement Agreement. (R pp 16, 106; Doc. Ex. 250) In fact, parts of the system were installed outside those boundaries. (R pp 16, 106; Doc. Ex. 250) The Tribe had also installed its stormwater system without giving notice and obtaining KMLD's approval, as required by the Easement Agreement. (R pp 16, 106; Doc. Ex. 250)

B. Procedural background

KMLD sued the Tribe for trespass, conversion, unfair and deceptive trade practices, injunctive relief, and breach of the easement agreements. (R pp 18-21) Based on sovereign immunity, the Tribe moved to dismiss and for judgment on the pleadings on the claims for trespass, conversion, unfair and deceptive trade practices, and injunctive relief. (R pp 128-29)

In its order granting the Tribe's motion, the trial court recognized that the parties' agreements waived the Tribe's sovereign immunity for claims that are directly or indirectly related to the agreements or to transactions contemplated thereunder. (R p 134)

The court then stated that a definition of “relate” in Merriam-Webster’s Online Dictionary is “to show or establish logical or causal connection between.” (R p 134)

The court next stated that a claim does not have a logical or causal connection to an agreement or to the transactions contemplated under that agreement unless the claim is “based on the express rights or restrictions in the Agreement.” (R p 134) The court cited no authority for this statement. (R p 134)

Finally, the court stated that only fifteen paragraphs in KMLD’s complaint make allegations that are based on the express rights or restrictions in the agreements. (R pp 134-35) The court called these allegations the “Actionable Allegations.” (R p 135)

Based on this reasoning, the court dismissed with prejudice KMLD’s entire conversion claim. (R p 135) The court also dismissed with prejudice KMLD’s claims for trespass, unfair and deceptive trade practices, and injunctive relief, except to the extent those claims are based on the Actionable Allegations. (R p 135)

The practical effect of this latter ruling is to dismiss substantially all of the trespass and unfair and deceptive trade practices claims. For

example, under the court's order, KMLD cannot use these claims to recover for the removal of its rocks and soil, the regrading that resulted in the loss of substantial developable land, or the unauthorized use of its land for numerous purposes, such as parking, construction activities, and dumping trash.

STANDARD OF REVIEW

The trial court granted the Tribe's motion to dismiss and for judgment on the pleadings based on sovereign immunity. This type of decision is reviewed de novo. *See, e.g., State ex rel. Stein v. Kinston Charter Academy*, 379 N.C. 560, 571, 866 S.E.2d 647, 655-56 (2021); *Hughes v. Bd. of Trs. Teachers' & State Employees' Ret. Sys.*, 296 N.C. App. 478, 486, 909 S.E.2d 697, 703 (2024).

When the Court conducts this de novo review, it takes the allegations in the complaint as true and construes those allegations in KMLD's favor. *See, e.g., Bates v. Charlotte-Mecklenburg Hist. Landmarks Comm'n*, 292 N.C. App. 1, 7, 897 S.E.2d 1, 6 (2024); *Bigelow*, 227 N.C. App. at 3, 745 S.E.2d at 319.

ARGUMENT

- I. The trial court erred when it held that sovereign immunity bars, in whole or in part, KMLD's claims for conversion, trespass, unfair and deceptive trade practices, and injunctive relief.

Federal law grants Indian tribes sovereign immunity from suit. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). But a tribe is not immune from suit if it enters into a contract that contains a clear waiver of its immunity. See *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418-19, 422-23 (2001).

The contracts in this case contain clear waivers of the Tribe's sovereign immunity. Each agreement states that the Tribe grants "a limited waiver of its sovereign immunity from suit." (R pp 30, 47, 66) The trial court did not deny that this language clearly waives the Tribe's sovereign immunity. (R pp 132-35) The court instead held that the Tribe's waivers do not cover certain claims by KMLD. (R pp 134-35)

That holding is erroneous. Each agreement waives the Tribe's immunity for "any" claim that is "directly or indirectly related to" the agreement or to "any transactions contemplated [t]hereunder," whether the claim arises "as a matter of contract or a tort." (R pp 30, 47, 66) The trial court misinterpreted this language in multiple ways.

The language in the waivers can only reasonably be interpreted fully to waive the Tribe's immunity for all three tort claims that KMLD asserts. And even if it was possible to read the language consistently with the trial court's interpretation, reversal would be required because determining the meaning of an ambiguous contract is a jury question. *See WakeMed v. Surgical Care Affiliates, LLC*, 243 N.C. App. 820, 824, 778 S.E.2d 308, 312 (2015). Thus, in the Rule 12(b)(6)/Rule 12(c) context, all ambiguities must be resolved in the plaintiff's favor. *See FS Med. Supplies, LLC v. TannerGap*, No. 3:21-cv-501, 2023 U.S. Dist. LEXIS 177299, at *113 (W.D.N.C. Sept. 30, 2023) (unpublished); *Ajuba Int'l, LLC v. Saharia*, 871 F. Supp. 2d 671, 689 (E.D. Mich. 2012).

- A. The trial court misinterpreted the waiver provisions in the parties' contracts.

The trial court based its interpretation of the agreements' waiver provisions on two holdings. Both holdings are erroneous.

First, the court held that these provisions are limited to claims that have a "logical or causal connection" to the agreements or to the transactions they contemplate. (R p 134) That conclusion contradicts the ordinary meaning of the key phrase in the waiver provisions: "related to."

It also ignores precedent from this Court and other appellate courts on the meaning of that phrase.

Second, the court held that the waiver provisions are further limited to claims that are “based on the express rights or restrictions” in each agreement. (R p 134) That conclusion lacks any logical or legal support and violates settled rules of contract interpretation.

1. The trial court’s interpretation is inconsistent with the ordinary meaning of the contract language and with appellate precedent.

The trial court’s holding that “related to” requires a “logical or causal connection” conflicts with the ordinary meaning of “related to” and with appellate precedent. (R p 134)

As dictionary definitions confirm, the word “related” does not require a logical or causal connection. For example, Merriam-Webster defines “related” to mean “connected by reason of an established or discoverable relation.” *Related*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/related> (last visited Dec. 22, 2025). Likewise, Black’s Law Dictionary defines “related” to mean “[c]onnected in some way; having relationship to or with something else.” *Related*, Black’s Law Dictionary (12th ed. 2024). Under these definitions, the word “related”

requires only that two things have *some* connection, not that the connection be a “logical or causal” one.

The trial court based its holding on a different dictionary definition: a definition of the word “relate.” (R p 134) It is true that one definition of “relate” is “to show or establish logical or causal connection between.” *Relate*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/relate> (last visited Dec. 22, 2025). That definition, however, applies only when “relate” is used as a transitive verb. *See id.* For example, that definition applies to the statement that a person “seeks to *relate* crime to poverty.” *Id.*

The waiver provisions here, however, do not use “relate” as a transitive verb. They instead use “related” as an adjective: “any claim or action that is directly or indirectly *related* to this Agreement.” (R pp 30, 47, 66) (emphasis added) When “related” is used in this way, as an adjective, it takes on the broad definitions above—definitions that do not require a logical or causal connection. *See Related*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/related> (last visited Dec. 22, 2025); *Related*, Black’s Law Dictionary (12th ed. 2024).

As these points show, the trial court based its first holding on the wrong dictionary definition. That holding conflicts with the dictionary definitions that actually apply in this case.

The trial court's first holding conflicts with appellate precedent as well. This Court has specifically held that the phrase "related to" *does not* require a causal connection. Multiple other appellate courts have held the same.

These precedents include this Court's decision in *Everhart v. O'Charley's, Inc.*, 200 N.C. App. 142, 683 S.E.2d 728 (2009). In *Everhart*, the defendant argued that the phrase "related to" in North Carolina's punitive-damages statute, N.C. Gen. Stat. § 1D-15(a), required the plaintiff to show a causal connection between the defendant's conduct and the plaintiff's injuries. 200 N.C. App. at 154, 683 S.E.2d at 738.

This Court rejected that argument. The statute did not define "related to," so the Court looked to the ordinary meaning of that phrase. *Id.* The Court found this ordinary meaning in the dictionary definition of "related": "having a relationship" or "connected by reason of an established or discoverable relation." *Id.* at 155, 683 S.E.2d at 738 (quoting *Related*, Webster's Third New International Dictionary 1916

(1968)). Because this definition did “not denote a causal connection,” this Court held that it could not “import a causation requirement into the statute.” *Id.* Instead, the Court held that the statute’s use of “related to” required only “a connection” between the defendant’s conduct and the plaintiff’s injuries. *Id.* at 155, 683 S.E.2d at 739.

This Court held the same in *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 613 S.E.2d 503, *disc. rev. denied*, 360 N.C. 177, 626 S.E.2d 649 (2005). There, as in *Everhart*, this Court concluded that the phrase “related to” in the punitive-damages statute requires a “connection” to the plaintiff’s harm. *Id.* at 560-61, 613 S.E.2d at 507-08. The Court did not mention any need for a *causal* connection. *See id.*

This Court’s decisions align with the decisions of other courts on the contractual meaning of “related to” or similar phrases. For example:

- The Second Circuit has held that “related to” is “not necessarily tied to the concept of a causal connection” and instead sweeps more broadly to mean “connected to” or “associated with.” *Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128-29 (2d Cir. 2001).

- The First Circuit has equated the phrases “relating to” and “with respect to” and held that these phrases are “broader than the concept of a causal connection.” *Huffington v. T.C. Grp.*, 637 F.3d 18, 22 (1st Cir. 2011).
- The Fourth Circuit has held that “relating to” is “broad language” that “is akin to the phrases ‘in connection with,’ ‘associated with,’ ‘with respect to,’ and ‘with reference to.’” *Whitaker v. Monroe Staffing Servs., LLC*, 42 F.4th 200, 210 (4th Cir. 2022) (quoting *Coregis*, 241 F.3d at 129).

The Eleventh Circuit has also adopted this same broad interpretation of “relating to” in the specific context here: a waiver of tribal sovereign immunity. *AQuate II LLC v. Myers*, 100 F.4th 1316, 1318 (11th Cir. 2024). In *AQuate*, a plaintiff sued an Indian tribe for misappropriation of trade secrets in connection with a bid for a federal contract under a Small Business Association program. *See id.* at 1318-19. The tribe’s articles of organization waived the tribe’s sovereign immunity for all disputes “relating to” the tribe’s involvement in SBA programs. *Id.* at 1320. The Eleventh Circuit held that the plaintiff’s trade-secret claims

related to the tribe's involvement in the program at issue, so the tribe had waived its immunity for those claims. *Id.* at 1321-22.

When it made that holding, the Eleventh Circuit stressed that the ordinary meaning of "relating to" is a broad one. *Id.* at 1321. In fact, the court concluded that it was hard "to think of a more capacious term to use in defining the coverage of a provision." *Id.* That is true, the court held, because "relating to" and similar phrases require only that two things have "a" connection or "some" connection, or be connected "in some way." *Id.* (internal quotation marks and alteration omitted).

The trial court's decision in this case is contrary to all of these precedents. By holding that "related to" requires a logical or causal connection, the court did just what *Everhart* and these other precedents forbid: It "import[ed] a causation requirement" into the agreements that the language of those agreements does not contain. *Everhart*, 200 N.C. App. at 155, 683 S.E.2d at 738-39.

This conflict between the decision here and the precedents above is especially stark because the waiver provisions in this case do not just use the phrase "related to." They instead use an even broader phrase: "directly or indirectly related to." (R pp 30, 47, 66) (emphasis added) By

expressly requiring only an indirect relation, this language is even more expansive than the language in the decisions above. It thus follows even more strongly from those decisions that the agreements here do not require a causal connection.

As these points show, the trial court erred when it held that the waiver provisions here require a logical or causal connection.

2. The court also violated established rules of contract interpretation.

Even if “related to” did require a logical or causal connection (which it does not), the trial court’s decision would still be erroneous. That is because the court also erred when it held that the waiver provisions are limited to claims that are “based on the express rights or restrictions in the Agreement.” (R p 134)

The trial court determined that a claim cannot have a logical or causal connection to an agreement or to the transactions that the agreement contemplates unless the claim is based on the agreement’s express rights or restrictions. (R p 134) The court did not, however, identify any legal support for that statement. The court did not offer any logical support for the statement either. Nor could it have done so: Even if a claim is not based on an agreement’s express rights or restrictions,

the claim can still have a logical or causal connection to the agreement, or at least to the transactions that the agreement contemplates. Indeed, as addressed below, that is true for the claims at issue here. *See infra* pp. 35 & n.4, 39-42 & n.5. As a result, the trial court's second holding lacks any legal or logical basis.

In addition, this second holding violates at least two bedrock rules of contract interpretation.

First, the trial court violated the rule that a court may not "insert words into [a contract] but must construe the contract as written." *Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d. 276, 282 (2005) (quoting *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975)), *disc. rev. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005). The court inserted words into the parties' contracts here by limiting the waiver provisions to claims that are "based on the express rights or restrictions" in the contracts. Indeed, this language appears nowhere in the waiver provisions.

Second, the court violated the rule that "a contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible."

Marcoin, Inc. v. McDaniel, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984), *disc. rev. denied*, 312 N.C. 797, 325 S.E.2d 631 (1985); *accord, e.g., Jones-Phillips Co. v. McCormick*, 174 N.C. 82, 86, 93 S.E. 449, 451 (1917) (“all parts of the writing, and every word in it will, if possible, be given effect”). Far from construing the parties’ agreements as a whole and giving effect to each part of them, the trial court made multiple parts of those provisions meaningless.

For example, by limiting the waiver provisions to claims that are based on the agreements’ express rights or restrictions, the trial court limited the waiver provisions to contract claims. That limitation nullifies the waiver provisions’ express statement that they cover tort claims. (R pp 30, 47, 66)

Likewise, by focusing solely on the rights and restrictions “in the Agreement[s]” (R p 134), the trial court nullified the provisions’ inclusion of claims that are related to “any transactions contemplated” under the agreements. (R pp 30, 47, 66)

Finally, the trial court’s interpretation gives no effect to the waiver provisions’ use of the phrase “directly or indirectly.” (R pp 30, 47, 66) Under the court’s holding, the parties could have omitted that phrase

from the contracts, and the contracts would still mean the same thing.

(See R pp 134-35)

In sum, both of the trial court's holdings about the waiver provisions in this case are erroneous. These provisions do not require a logical or causal connection between KMLD's claims and the agreements or the contemplated transactions. Nor do those provisions limit the Tribe's waiver of immunity to claims that are based on the agreements' express rights or restrictions. As a result, the trial court erred by relying on these holdings to dismiss KMLD's claims.

B. The Tribe has waived its immunity for all of KMLD's claims.

As shown above, when the waiver provisions in this case are interpreted correctly, they are quite broad. These provisions cover all claims that, directly or indirectly, are connected in some way with or have some relationship to either the parties' agreements or any transactions contemplated by those agreements. *See supra* pp. 23-29. All of KMLD's claims satisfy these criteria. Thus, this Court should reverse the trial court's order and reinstate KMLD's claims in full.

1. KMLD's claims for trespass and conversion fall within the sovereign immunity waivers.

KMLD's claims for trespass and conversion are based on the Tribe and its contractors' unauthorized entry and activities on KMLD's land. (R pp 3, 5-6, 9-11, 18-19) At a minimum, these claims have an indirect connection with or relationship to the easement agreements. That is true for multiple reasons.

First, the trespass and conversion claims relate to the easement agreements because the validity of these claims depends on whether the easements authorized the Tribe's conduct. Under North Carolina law, if the easements authorized the Tribe's conduct, the conduct would not be a trespass or conversion. *See CDC Pineville, LLC v. UDRT of N.C., LLC*, 174 N.C. App. 644, 652, 622 S.E.2d 512, 518 (2005) ("As an affirmative defense to trespass, a defendant may assert that its entry onto plaintiff's land was lawful or under legal right." (internal quotation marks omitted)), *disc. rev. denied*, 360 N.C. 478, 630 S.E.2d 925 (2006); *Edwards v. Hill*, 208 N.C. App. 178, 192, 703 S.E.2d 452, 461 (2010) (holding that the defendants did not commit a trespass because they had an easement that allowed their conduct). By the same token, if the easements did not authorize the Tribe's conduct, that conduct would be a trespass and

conversion. For these reasons, the easements and the claims for trespass and conversion are not just related but closely intertwined.

Second, these claims involve conduct during, and as part of, the Tribe's construction of its casino. For example, the Tribe and its contractors trespassed on KMLD's land and used and carried away KMLD's rocks and soil to expedite construction of the casino. (R pp 3, 5; Doc. Ex. 246) Facilitating the Tribe's construction of the casino was the reason why KMLD granted the easements. (*See, e.g.*, R p 8 ("KMLD agreed to . . . grant easements to the Tribe on certain portions of KLMD's remaining land for construction of a new casino")); R p 28 (granting easement for "construction staging" and "laydown areas" for casino project)). Indeed, the very name of one of the easements is a Temporary *Construction* Easement Agreement. (R p 27 (emphasis added)) Thus, the casino construction was a transaction contemplated under the easement agreements. As a result, the trespass and conversion claims have a direct (or at the very least an indirect) connection with "any transactions contemplated" under those agreements. R pp 30, 47, 66; *see also, e.g., McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp.*, 98 N.C. App. 151, 152, 389 S.E.2d 636, 637 (1990) (stressing the breadth of the word "any").

Third, KMLD granted easements to the Tribe to facilitate construction of the Tribe's new casino. Within three months of the execution of the agreements, the Tribe began its unauthorized use of KMLD's property to construct that casino. (R pp 5, 8-11) In doing so, the Tribe trespassed on KMLD's property and converted rocks and soil to its own use. (R pp 3, 5, 9-11; Doc. Ex. 246) KMLD's trespass and conversion claims are thus sequentially and temporally connected with the easement agreements—and are therefore directly or indirectly related to the agreements.⁴

Fourth, the Tribe itself has implicitly admitted that the conduct on which the trespass and conversion claims are based relates to the easement agreements. In its counterclaim, the Tribe has stated that the following activities were “related to the use of easements”: “certain grading/sloping on the easement abutting the . . . construction project that is expected to be landscaped and would be substantially more aesthetically pleasing than construction of a retaining wall,” and the

⁴ These points also show that the trespass and conversion claims are logically and causally connected with the easement agreements. As a result, even if the trial court's first holding were correct and the waiver provisions required a logical or causal connection (R p 134), that requirement would be satisfied here.

removal of rocks. (R p 124) The Tribe's unauthorized grading and sloping of KMLD's land to avoid building a retaining wall is part of the trespass activity, while the Tribe's removal of rocks is at the heart of KMLD's conversion claim. (R pp 3, 5, 9-10) The Tribe's admission that these activities are "related to the use of easements" confirms that these claims relate to the easement agreements and thus fall within the Tribe's waiver of its sovereign immunity.

Finally, the idea that KMLD's trespass and conversion claims do not relate to the easement agreements defies logic and common sense. As KMLD alleged in its Complaint, it granted the easements "for construction of a new casino," based on the Tribe's representation that "it would respect KMLD's property rights and would communicate in good faith to protect KMLD's future development needs." (R p 8) Shortly after the easement agreements were executed, however, the Tribe trespassed on KMLD's property and began using that property without regard to any of the limitations or terms of the easements. (R pp 8-11, 13-15) The Tribe ran roughshod over KMLD's land and engaged in the exact types of tortious conduct that KMLD sought to guard against through the broad

waiver language in the easements and that KMLD seeks to recover for through the claims at issue here.

As these points show, any conclusion that these claims and the easements are unconnected would conflict with the broad waiver language in the easements. This broad language includes the statements that a waiver applies even when the relationship is “indirect,” and that the waiver applies to any claim “arising as a matter of contract or a tort.” (R pp 30, 47, 66)

A decision affirming the trial court in this case would also leave KMLD with no meaningful trespass or conversion claim as a remedy for the Tribe’s past tortious conduct on KMLD’s property, or for any similar conduct in the future. The Tribe would be able to enter KMLD’s property at any time, take KMLD’s soil, dirt, and rocks at will, and re-slope KMLD’s property in any manner the Tribe chose to aid its construction. KMLD would have no ability to sue the Tribe for trespass and conversion despite having bargained for the broad waivers of sovereign immunity in the easement agreements.

As the Eleventh Circuit stated in *AQuate*, “[i]t would defy common sense” to find an absence of a waiver in this type of situation. 100 F.4th

at 1321. That is especially true because, “[a]s a practical matter, it is not obvious what other language could have been employed to cover this kind of claim if ‘related to’ were not enough.” *Id.* It is also true because, as the Supreme Court stressed in *C & L Enterprises*, a tribe’s waiver of sovereign immunity should be construed to have “a real world objective,” as opposed to being treated like a “regulation of a game lacking practical consequences.” 532 U.S. at 422.

2. KMLD’s claim for unfair and deceptive trade practices also falls within the sovereign immunity waivers.

The waiver provisions in the parties’ agreements also cover KMLD’s claim for unfair and deceptive trade practices. This claim has four independent bases. Each of these bases is at least indirectly related to the easement agreements, the Restrictive Covenant, or a transaction that those agreements contemplate: the construction of the casino.

The first basis for the unfair and deceptive trade practices claim is that the Tribe’s egregious trespass activity and conversion constitute unfair and deceptive trade practices. (R p 21) *See also* 1 Noel Allen, North Carolina Unfair Business Practice § 19.02 (2025) (“courts [have] continued to find that the torts of trespass and conversion constituted unfair trade practice[s]”); *Taha v. Thompson*, 120 N.C. App. 697, 704, 463

S.E.2d 553, 558 (1995); *Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511, 518-19, 389 S.E.2d 576, 580, *disc. rev. denied*, 326 N.C. 801, 393 S.E.2d 898 (1990). As discussed above, the Tribe’s trespass and conversion activities relate to the easement agreements. *See supra* pp. 33-38. Thus, the unfair and deceptive trade practices claim relates to those agreements as well.⁵

The second basis for this claim is the Tribe’s deceptive conduct that induced KMLD to execute the easements and convey Parcel C to the Tribe—namely, the Tribe’s oral misrepresentations that it would let KMLD construct and operate a parking facility for the new casino on KMLD’s land. *See* R p 8; Doc. Ex. 247-48; *SciGrip, Inc. v. Osaе*, 373 N.C. 409, 426, 838 S.E.2d 334, 347 (2020) (unfairness or deception in the formation of a contract may support an unfair and deceptive trade practices claim); *Canady v. Mann*, 107 N.C. App. 252, 261, 419 S.E.2d 597, 603 (1992) (reversing summary judgment on unfair and deceptive trade practices claim where evidence supported allegations that plaintiffs

⁵ As noted above, the trespass and conversion claims also satisfy the trial court’s “logical and causal connection” standard. *See supra* p. 35 n.4. Thus, the unfair and deceptive trade practices claim satisfies that standard as well. The other bases for the unfair and deceptive trade practices claim discussed below also show a logical or causal connection.

were fraudulently induced to purchase lots unsuitable for building). Because this claim involves the Tribe's inducement of KMLD to enter the easement agreements, the claim relates to the easement agreements. Likewise, because Parcel C was subject to the Restrictive Covenant (R pp 8-9, 62-74), the Tribe's inducement of KMLD to transfer Parcel C is at least indirectly connected with the Restrictive Covenant. In addition, this claim relates to the construction of the casino, so it relates to a transaction contemplated under the agreements.

The third basis for KMLD's claim is the Tribe's unfair and deceptive conduct that induced KMLD to execute the easements when the Tribe had no intention to honor the easements, and the Tribe's egregious breaches of the easements shortly after their execution. *See* R pp 3, 5, 8-11, 13-15; Doc. Ex. 246-50; *Unifour Constr. Servs. v. Bellsouth Telcoms.*, 163 N.C. App. 657, 666-67, 594 S.E.2d 802, 808-09 (2004) (reversing directed verdict on unfair and deceptive trade practices claim where plaintiff presented evidence that defendant "had never intended to fulfill its agreement"). These points reinforce that KMLD's claim involves the Tribe's inducement of KMLD to execute the easement agreements, so the claim relates to those agreements.

The fourth basis for this claim is that the Tribe made misrepresentations to KMLD. These misrepresentations included a statement that the Tribe had located the stormwater system within the boundaries of the Easement Agreement. (R pp 16, 106; Doc. Ex. 250) They also included a statement that muddy conditions on the KMLD Tract prevented the Tribe from promptly removing its construction equipment (a statement made while the Tribe continued to trespass on KMLD's land to finish the installation of the casino footers and pilings). See R pp 15-16; Doc. Ex. 249; *Post v. Avita Drugs, LLC*, 2017 NCBC 93, ¶ 28 (N.C. Super. Ct. Oct. 11, 2017) (the "concealment of a breach combined with acts to deter further investigation" supports an unfair and deceptive trade practices claim) (internal quotation marks omitted).

The Tribe's misrepresentation that the installation of its stormwater system was within the boundaries of the Easement Agreement directly relates to the Easement Agreement. Similarly, the Tribe's misrepresentation about muddy conditions allowed the Tribe to continue trespassing on KMLD's property to complete construction of the casino. Thus, that misrepresentation relates to the easement agreements

and to a transaction contemplated by those agreements for the same reason that the Tribe's trespass activity does. *See supra* pp. 33-38.

In sum, each of the four bases for KMLD's claim for unfair and deceptive trade practices relates, either directly or indirectly, to the parties' agreements or to transactions contemplated by those agreements. Thus, the Tribe has waived its sovereign immunity for this claim.

3. KMLD's claim for injunctive relief falls within the sovereign immunity waivers as well.

The Tribe has also waived its sovereign immunity for KMLD's injunctive relief claim. The waiver provisions explicitly state that the Tribe waives its immunity for claims that seek "injunctive or declaratory relief." (R pp 30, 47, 66) In addition, this claim seeks to prevent the Tribe from continuing to take the actions on which KMLD's claims for trespass, conversion, and unfair and deceptive trade practices are based. (R pp 21-22) Because the latter claims relate to the parties' agreements and to transactions contemplated thereunder, the claim for injunctive relief does as well.

In sum, under a proper interpretation of the waiver provisions in the parties' agreements, all of KMLD's claims at issue here relate to those agreements or to transactions that those agreements contemplate. The Tribe has thus waived its sovereign immunity for all of these claims. As a result, the trial court erred when it dismissed these claims, in whole or in part, based on the Tribe's sovereign immunity.

CONCLUSION

For the foregoing reasons, KMLD respectfully requests that this Court reverse the trial court's order granting the Tribe's partial motion to dismiss and for judgment on the pleadings.

Respectfully submitted, this 23rd day of December, 2025.

ROBINSON, BRADSHAW & HINSON, P.A.

Electronically Submitted

Robert W. Fuller

N.C. State Bar No. 10887

rfuller@rbh.com

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.

Erik R. Zimmerman
N.C. State Bar No. 50247
ezimmerman@rbh.com

Kevin R. Crandall
N.C. State Bar No. 50643
kcrandall@rbh.com

101 North Tryon Street, Suite 1900
Charlotte, NC 28246
Telephone: (704) 377-2536

TEDDY, MEEKINS & TALBERT, P.L.L.C.

Will Meekins
N.C. State Bar No. 61004
wmeekins@tmtlawyers.com

1219 Fallston Road
Shelby, NC 28150
Telephone: (704) 487-1234

WYATT & BLAKE, LLP

James F. Wyatt, III
N.C. State Bar No. 13766
jwyatt@wyattlaw.net

Robert A. Blake, Jr.
N.C. State Bar No. 20858
rblake@wyattlaw.net

402 W. Trade Street, Suite 101
Charlotte, NC 28202
Telephone: (704) 331-0767

*Attorneys for Plaintiff-Appellant
Kings Mountain Land Development
Partners, LLC*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for plaintiff-appellant certifies that the foregoing brief, which is prepared using a proportional font, contains fewer than 8,750 words (excluding the cover, index, table of authorities, certificate of service, this certificate of compliance, appendix, and addendum) as reported by the word-processing software.

This 23rd day of December, 2025.

Electronically Submitted
Robert W. Fuller

CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I certify that the foregoing has been served today on defendant-appellee by email to the following counsel:

Michael W. Mitchell, Esq.
mmitchell@smithlaw.com
Jang H. Jo, Esq.
jjo@smithlaw.com
SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.
P.O Box 2611
Raleigh, NC 27602
(919) 821-1220

Dionè C. Carroll, Esq.
dione@carroll-law-offices.com
CARROLL LAW OFFICES, P.A.
107 Pendleton St., NW
Aiken, SC 29801
(803) 514-2557

*Attorneys for Defendant-Appellee
Catawba Indian Nation*

This the 23rd day of December, 2025.

Electronically Submitted
Robert W. Fuller

CONTENTS OF APPENDIX

Statutes

N.C. Gen. Stat. § 1-277App. 1

N.C. Gen. Stat. § 1D-15App. 2

N.C. Gen. Stat. § 7A-27App. 4

West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter IX. Appeal
Article 27. Appeal (Refs & Annos)

N.C.G.S.A. § 1-277

§ 1-277. Appeal from superior or district court judge

Effective: June 23, 2023

[Currentness](#)

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, that affects a substantial right claimed in any action or proceeding; or that in effect determines the action and prevents a judgment from which an appeal might be taken; or discontinues the action or grants or refuses a new trial.

(b) Any interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant, or the party may preserve the party's objection for determination upon any subsequent appeal in the cause.

Credits

Amended by Laws 1967, c. 954, § 3(j); Laws 1971, c. 268, § 10; [S.L. 2023-54, § 3, eff. June 23, 2023](#).

[Notes of Decisions \(1026\)](#)

N.C.G.S.A. § 1-277, NC ST § 1-277

The statutes and Constitution are current through S.L. 2025-97 of the 2025 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

West's North Carolina General Statutes Annotated
Chapter 1D. Punitive Damages (Refs & Annos)

N.C.G.S.A. § 1D-15

§ 1D-15. Standards for recovery of punitive damages

Currentness

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

(1) Fraud.

(2) Malice.

(3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

(c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

(d) Punitive damages shall not be awarded against a person solely for breach of contract.

Credits

Added by [Laws 1995, c. 514, § 1, eff. Jan. 1, 1996.](#)

[Notes of Decisions \(148\)](#)

N.C.G.S.A. § 1D-15, NC ST § 1D-15

The statutes and Constitution are current through S.L. 2025-97 of the 2025 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

End of Document

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West's North Carolina General Statutes Annotated
Chapter 7A. Judicial Department
Subchapter II. Appellate Division of the General Court of Justice
Article 5. Jurisdiction (Refs & Annos)

N.C.G.S.A. § 7A-27

§ 7A-27. Appeals of right from the courts of the trial divisions

Effective: October 3, 2025

[Currentness](#)

(a) Appeal lies of right directly to the Supreme Court in any of the following cases:

- (1) All cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.
- (2) From any final judgment in a case designated as a mandatory complex business case pursuant to [G.S. 7A-45.4](#) or designated as a discretionary complex business case pursuant to [Rule 2.1 of the General Rules of Practice for the Superior and District Courts](#).
- (3) From any interlocutory order of a Business Court Judge that does any of the following:
 - a. Affects a substantial right.
 - b. In effect determines the action and prevents a judgment from which an appeal might be taken.
 - c. Discontinues the action.
 - d. Grants or refuses a new trial.

(4) Any trial court's decision regarding class action certification under [G.S. 1A-1, Rule 23](#).

(5) Repealed by [S.L. 2021-18, § 1, eff. July 1, 2021](#).

(6) In all cases where a defendant has challenged a method of execution under [G.S. 15-188](#), and a trial court has declared the method unconstitutional.

(a1) Repealed by [S.L. 2016-125, § 22\(b\), \(4th Ex. Sess.\), eff. Dec. 16, 2016](#).

(b) Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases:

(1) From any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under [G.S. 127A-62](#).

(2) From any final judgment of a district court in a civil action.

(3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

- e. Determines a claim prosecuted under [G.S. 50-19.1](#).

- f. Grants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly. This sub-subdivision only applies where the State or a political subdivision of the State is a party in the civil action.

- g. Denies, upon the court's own motion or the motion of a party, the transfer of an action or proceeding pursuant to [Rule 42\(b\)\(4\) of the North Carolina Rules of Civil Procedure](#).

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute.

(c) to (e) Repealed by [S.L. 2013-411, § 1, eff. Aug. 23, 2013](#).

Credits

Added by Laws 1967, c. 108, § 1. Amended by Laws 1971, c. 377, § 3; Laws 1973, c. 704; Laws 1977, c. 711, § 4; Laws 1987, c. 679; [Laws 1995, c. 204, § 1](#); [S.L. 2010-193, § 17, eff. Dec. 1, 2010](#); [S.L. 2013-411, § 1, eff. Aug. 23, 2013](#); [S.L. 2014-100, § 18B.16\(e\), eff. Aug. 7, 2014](#); [S.L. 2014-102, § 1, eff. Oct. 1, 2014](#); [S.L. 2015-264, § 1\(b\), eff. Oct. 1, 2015](#); [S.L. 2016-125, § 22\(b\), eff. Dec. 16, 2016](#); [S.L. 2017-7, § 2, eff. April 26, 2017](#); [S.L. 2021-18, § 1, eff. July 1, 2021](#); [S.L. 2023-134, § 16.21\(c\), eff. Oct. 3, 2023](#); [S.L. 2025-93, § 6.5\(e\), eff. Oct. 3, 2025](#).

Notes of Decisions (1881)

N.C.G.S.A. § 7A-27, NC ST § 7A-27

The statutes and Constitution are current through S.L. 2025-97 of the 2025 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

CONTENTS OF ADDENDUM

Unpublished Decision

FS Med. Supplies, LLC v. TannerGap,
No. 3:21-cv-501, 2023 U.S. Dist. LEXIS
177299 (W.D.N.C. Sept. 30, 2023)Add. 1



Neutral

As of: December 22, 2025 7:15 PM Z

[FS Med. Supplies, LLC v. Tannergap](#)

United States District Court for the Western District of North Carolina, Charlotte Division

September 30, 2023, Decided; September 30, 2023, Filed

3:21-cv-00501-RJC-WCM

Reporter

2023 U.S. Dist. LEXIS 177299 *; 2023 WL 6396050

FS MEDICAL SUPPLIES, LLC, Plaintiff, v. TANNERGAP, INC.; TANNER PHARMA UK LIMITED; RAYMOND FAIRBANKS BOURNE; and STEPHEN JOHN SCALIA, Defendants.

Prior History: [FS Med. Supplies, LLC v. Tannergap, 2023 U.S. Dist. LEXIS 178580 \(W.D.N.C., July 14, 2023\)](#)

Core Terms

motion to dismiss, parties, recommendation, unfair, direct contract, written permission, claim for breach, magistrate judge, provisions, deceptive, manufacturer, aggravating, contracts, alleges, egregious, objects, fails, deceptive trade practices, interpretations, contractual, ambiguous, sections, circumstances, reconcilable, argues

Counsel: [*1] For FS Medical Supplies, LLC, Plaintiff: Austin Thomas Jackson, Cody Austin Brittain, Mark Reynold Prioste Figueiredo, LEAD ATTORNEYS, PRO HAC VICE, Structure Law Group, San Jose, CA; David A. Luzum, Lex M. Erwin, LEAD ATTORNEYS, Erwin, Bishop, Capitano & Moss, P.A., Charlotte, NC.

For TannerGAP, Inc., Tanner Pharma UK Limited, Defendants: Bradley R. Kutrow, LEAD ATTORNEY, McGuireWoods LLP, Charlotte, NC; Jessica Lynn O'Brien, LEAD ATTORNEY, Charlotte, NC.

Judges: Robert J. Conrad, Jr., United States District Judge.

Opinion by: Robert J. Conrad, Jr.

Opinion

ORDER

THIS MATTER is before the Court on Defendants' Motions to Dismiss, (Doc. Nos. 62, 65, 67, 69, 71), the Magistrate Judge's Memorandum and Recommendation ("M&R"), (Doc. No. 110), and the parties' various objections and responses. (Doc. Nos. 111, 112, 113, 114, 115, 116). For the reasons below, the M&R is **ADOPTED**, and the Motions to Dismiss are **DENIED IN PART**.

I. BACKGROUND

This case arises from a contractual relationship between FS Medical Supplies, LLC ("FSMS"), TannerGAP, Inc., and Tanner Pharma UK Limited ("TPUK"), formed in the early days of the COVID-19 pandemic. Seeking a mutually beneficial arrangement when supply chains were limited and relationships were [*2] valuable, the parties entered into two agreements: the Non-Circumvention Agreement and the Distribution Agreement. Under these two agreements, FSMS would source medical supplies from its established industry contacts, TannerGAP and TPUK would connect FSMS with healthcare distributors, and the parties would share the profits equally. The relationship

ended almost before it began. Though the parties agreed that neither would co-opt the "Personal Relationships" of the other without permission, and the two contracts imposed certain restrictions on TannerGAP and TPUK's ability to enter direct contracts with manufacturers of medical supplies, FSMS alleges that TPUK breached both agreements by entering into a direct contract with one of FSMS's suppliers, Orient Gene, in order to sell billions of dollars' worth of COVID tests to the government of the United Kingdom and other customers.

The Magistrate Judge recounted the factual and procedural background of this case at length in the M&R. Neither party objected to the Magistrate Judge's factual recitation, although TannerGAP and TPUK contest their legal application. The Court will address these contentions, for example, in Section III.B.i., [*3] *supra*, but otherwise adopts the facts as set forth in the M&R.

II. STANDARD OF REVIEW

A district court may assign dispositive pretrial matters, including motions to dismiss, to a magistrate judge for "proposed findings of fact and recommendations." [28 U.S.C. § 636\(b\)\(1\)\(A\)](#), [\(B\)](#). The Federal Magistrate Act provides that a district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* [§ 636\(b\)\(1\)\(C\)](#); see also [Fed. R. Civ. P. 72\(b\)\(3\)](#). However, "when objections to strictly legal issues are raised and no factual issues are challenged, de novo review of the record may be dispensed with." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). De novo review is also not required "when a party makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Id.* Similarly, when no party objects, "a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" [Diamond v. Colonial Life & Acc. Ins. Co.](#), 416 F.3d 310, 315 (4th Cir. 2005) (quoting [Fed. R. Civ. P. 72](#), advisory committee's note).

III. DISCUSSION

A. Rulings Without Objections

As noted above, when a party raises no objection to a decision of [*4] the Magistrate Judge, the Court need "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." [Diamond](#), 416 F.3d at 315 (quoting [Fed. R. Civ. P. 72](#), advisory committee's note).

Defendants raised no objection to the Magistrate Judge's ruling on jurisdiction, (Doc. No. 112 at 2 n.1); its ruling on Defendants' *forum non conveniens* arguments; nor the Magistrate Judge's recommendation of dismissal on its claim for breach of the implied covenant of good faith and fair dealing, (Doc. No. 111).¹ This Court has conducted a full review of the M&R and other documents of record, and having done so, finds that the recommendations of the Magistrate Judge as to (1) the exercise of personal jurisdiction over Defendants; (2) Defendants' *forum non conveniens* arguments; and (3) FSMS's claim for breach of the implied covenant of good faith and fair dealing are, in all respects, in accordance with the law and should be approved. Accordingly, the Court will exercise personal jurisdiction over Defendants, the parties will litigate this action in this Court, and FSMS's claim for breach of the implied covenant of good faith and fair dealing is dismissed.

¹ FSMS does argue in its responses to Defendants' objections that, if the Court "adopts Defendants' position that they had the absolute discretion to 'go direct,' it must not dismiss the good faith claim." (Doc. No. 115 at 19-20). FSMS declined to object to the Magistrate Judge's recommendation of dismissal on its good faith and fair dealing claim, however, and FSMS brings this new argument too late. Nonetheless, as the Court does not adopt Defendants' interpretation of the Distribution Agreement, FSMS's argument is immaterial.

Finally, neither party objected to the [*5] Magistrate Judge's application of Delaware law to both the Distribution Agreement and the Non-Circumvention Agreement. According to the Distribution Agreement's choice of law provision, the Distribution Agreement "shall be governed by the laws of the State of Delaware, without regard to that state's conflicts of law provisions." (Doc. No. 63-1 at § 30). Such provisions are enforceable under North Carolina contract law, [Perkins v. CCH Computax, Inc., 333 N.C. 140, 145, 423 S.E.2d 780, 783 \(1992\)](#), which this Court must apply as a federal court sitting in diversity in North Carolina. [Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co. Inc., 386 F.3d 581, 599 \(4th Cir. 2004\)](#).

Thus, in considering FSMS's claims as related to the Distribution Agreement, and to the extent that interpretation of the Distribution Agreement affects application of the Non-Circumvention Agreement, the Court will apply Delaware law. Moreover, because the Court construes the Distribution Agreement and the Non-Circumvention Agreements as one integrated agreement, and because the parties evidently intend for Delaware law to govern their contractual relationship,² this Court will interpret the Non-Circumvention Agreement under Delaware law, notwithstanding the parties' California choice of law provision in that earlier agreement. (Doc. No. 63-2 at § 12); see *Reserves Mgmt., LLC v. Am. Acquisition Prop. I, LLC*, 86 A.3d 1119 (Del. 2014) (table) ("[T]he paramount [*6] rule for the interpretation of covenants is so to expound them as to give effect to the actual intent of the parties.").

B. Rulings With Objections

i. FSMS States a Claim for Breach of the Distribution Agreement

"In order to survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." [VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 \(Del. 2003\)](#). In applying this standard, the Magistrate Judge found that FSMS stated a claim for breach of the Distribution Agreement against both TannerGAP and TPUK. TannerGAP argues that the Magistrate Judge erred because only TPUK is subject to liability and such liability is separate, not joint and several.

Under Delaware law, "[a]n obligation or written contract of several persons shall be joint and several, unless otherwise expressed." [6 Del. C. § 2701](#). "This presumption of joint and several liability can only be rebutted by evidence revealing the objective intent of the parties to have a different type of obligation" which may be "revealed by the language of the contract, the subject matter, and the circumstances [*7] surrounding creation of the obligation." [Falco v. Alpha Affiliates, Inc., No. 97-cv-494, 2000 U.S. Dist. LEXIS 7480, 2000 WL 727116, at *11 \(D. Del. Feb. 9, 2000\)](#) (applying Delaware law).

TannerGAP claims that Sections 9, 10, and 12 of the Distribution Agreement reveal the parties' objective intent to impose separate liability. Those sections describe various procedures for issuing purchase orders, and, TannerGAP argues, these sections indicate that liability would be based on those purchase orders on a case-by-case-basis. These sections, however — along with the rest of the Distribution Agreement — express only an intent to treat TannerGAP and TPUK as one entity. The Distribution Agreement defines "TANNER" as both TannerGAP, Inc. and its "sister European company Tanner Pharma UK Limited." (Doc. No. 63-1 at 1). Any references to "TANNER" in Sections 9, 10, and 12 refer, as a matter of definition, to both TannerGAP and TPUK. Moreover, TannerGAP and TPUK are represented in the Distribution Agreement by a single signature block, which the companies' shared President and Director signed on their behalf. (*Id.* at 12). Any intent to provide separate liability is imperceptible. The presumption of joint and several liability, therefore, remains in place.

²(Doc. No. 63-1 at § 30 (Delaware choice of law provision in Distribution Agreement, which purported to supersede earlier agreements but left the Non-Circumvention Agreement in place); Doc. No. 112 at 8-14 (TPUK and TannerGAP interpreting Non-Circumvention Agreement under Delaware Law); Doc. No. 115 at 15-19 (FSMS interpreting Non-Circumvention Agreement under Delaware law)).

- Add. 4 -

2023 U.S. Dist. LEXIS 177299, *7

TPUK objects to the Magistrate Judge's recommendation on [*8] the Distribution Agreement on two different bases: first, that § 10 of the Distribution Agreement allows TPUK to enter into direct contracts with manufacturers, and second, that FSMS directed TPUK to contract with Orient Gene as contemplated in § 7 of the Distribution Agreement. Neither objection has merit.

The Distribution Agreement addresses direct contracts in two provisions:

TANNER hereby agrees to purchase the Covered Products from FSMS (or directly from the manufacturer of a Covered Product if directed by FSMS)

This Agreement shall allow TANNER to enter into a direct PO or contract with the manufacturer of a Covered Product so long as the financial arrangement outlined in Section 9 above shall be maintained as if TANNER purchased Covered Products directly from FSMS with a 50% gross profit participation to each Party.

(Doc. No. 63-1 at §§ 7, 10). The latter provision, TPUK argues, allows TPUK to enter into contracts with manufacturers regardless of direction by FSMS. "It is well established that a court interpreting any contractual provision ... must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions [*9] of the instrument." [Elliott Assocs., Ltd. P'ship v. Avatex Corp., 715 A.2d 843, 854 \(Del. 1998\)](#). These provisions are reconcilable. Reading the contract as a whole and reconciling these provisions, the Court finds that §§ 7 and 10 operate in tandem; § 10's conditions on direct contracts do not replace § 7's "if directed" provision, but rather complement it. These sections together outline a single process for entering into direct contracts, and thus, Defendants must abide by both § 10 and § 7.

Finally, TPUK argues that FSMS directed TPUK to enter into a contract with Orient Gene, as § 7 requires. TPUK points to two actions by FSMS that it characterizes as directions to enter into a contract with Orient Gene: FSMS setting up an initial call between Defendants and Orient Gene and FSMS providing TPUK with an "account opening form."

FSMS paints a different picture. "Between September 21 and September 23, 2020," FSMS alleges, "Tanner Pharma UK issued Purchase Orders directly to Orient Gene for [redacted] units at a price of [redacted] per unit. Defendants did not inform FSMS of this fact and indeed induced Orient Gene to keep it secret from FSMS." (Doc. No. 58 at ¶ 73). To be sure, FSMS consented to TPUK communicating with Orient Gene, but Defendants fail to show that FSMS directed [*10] TPUK to enter into a contract. To the contrary, FSMS alleges that Defendants entered into a direct contract with Orient Gene without informing FSMS, deceived FSMS about the existence of that contract, and based that contract on a price FSMS did not ratify. (*Id.* at 73-85). Defendants reveal no direction in these allegations. Thus, because FSMS does sufficiently allege that TannerGAP and TPUK breached the parties' Distribution Agreement, FSMS survives the motion to dismiss on that claim.

ii. FSMS States a Claim for Breach of the Non-Circumvention Agreement

The Magistrate Judge also recommended that FSMS's claim against TPUK and TannerGAP for breach of the Non-Circumvention Agreement be allowed to proceed. TPUK and TannerGAP object to that recommendation for two reasons: (1) the Distribution Agreement terminates the Non-Circumvention Agreement; and (2) if the Non-Circumvention Agreement was operative, FSMS fails to allege that TPUK and TannerGAP breached it. Because the Distribution Agreement is ambiguous, and because FSMS alleges sufficient facts to state a claim for breach of the Non-Circumvention Agreement, neither argument has merit.

When determining a party's contractual obligations, [*11] "the role of a court is to effectuate the parties' intent." [Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 \(Del. 2006\)](#). That intent must be unambiguous, however, and "on a motion to dismiss for failure to state a claim a trial court cannot choose between two differing reasonable interpretations of ambiguous documents." [Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc., 691 A.2d 609, 613 \(Del. 1996\)](#). A contract is ambiguous "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." [Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 \(Del. 1992\)](#).

- Add. 5 -

2023 U.S. Dist. LEXIS 177299, *11

TPUK and TannerGAP argue that the Distribution Agreement terminates the Non-Circumvention Agreement because the parties entered into the Distribution Agreement last, and it terminates "all prior written and oral agreements." But the Distribution Agreement is ambiguous, and their objection fails. The Distribution Agreement states that:

This Agreement constitutes the entire agreement and understanding of the Parties regarding the subject matter of this Agreement and supersedes all prior written and oral agreements, proposals, and understandings between the Parties regarding the subject matter of this Agreement.

(Doc. No. 63-1 at § 32). The Distribution Agreement also provides:

In the case of termination by either Party, the separate Mutual Non-Disclosure & Non-Circumvention [*12] Agreement dated June 8, 2020 between the Parties shall remain in place and in effect and neither Party shall circumvent the other Party with any relationship originally established by the first Party.

(Doc. No. 63-1 at §§ 32, 16.4).

While Defendants offer a plausible reading, theirs is not the only reasonable interpretation. Under FSMS's proposed reading, the second provision preserves the Non-Circumvention Agreement by using the language "shall remain in place and effect." Both interpretations are reasonable — an agreement cannot remain where it does not exist. Therefore, the contract is ambiguous, see [Rhône-Poulenc Basic Chems. Co., 616 A.2d at 1196](#), and because the Court cannot choose between two reasonable interpretations, dismissal is improper. [Vanderbilt Income & Growth Assocs., 691 A.2d at 613](#); see also [Ruffalo v. Transtech Serv. P'rs Inc., Civil Action No. 5039-VCP, 2010 Del. Ch. LEXIS 183, 2010 WL 3307487, at *10 \(Del. Ch. Aug. 23, 2010\)](#) ("[W]hen a motion to dismiss requires interpretation of a contract, the finding of an ambiguity will scuttle the defendant's chances of dismissing the plaintiff's claim.").

Defendants further argue that, even if the Non-Circumvention Agreement operates, they could enter into contracts with Orient Gene because (1) the Distribution Agreement controls where it conflicts with the Non-Circumvention Agreement, and (2) FSMS gave TPUK "express written permission" to contract with Orient [*13] Gene. Both arguments again fail.

Under Delaware law, as previously noted, "a court interpreting any contractual provision ... must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument." [Elliott Assocs., Ltd. P'ship, 715 A.2d at 854](#). Here, the Non-Circumvention Agreement is incorporated into the Distribution Agreement by reference, and the two agreements are interpreted as one.³ Though the Distribution Agreement and the Non-Circumvention Agreement provide different requirements, the merged agreement is reconcilable, and the provisions do not conflict. The Distribution Agreement provides:

TANNER hereby agrees to purchase the Covered Products from FSMS (or directly from the manufacturer of a Covered Product if directed by FSMS)

This Agreement shall allow TANNER to enter into a direct [purchase order] or contract with the manufacturer of a Covered Produce so long as the financial arrangement outlined in Section 9 above shall be maintained as if TANNER purchased Covered Products directly from FSMS with a 50% gross profit participation to each party.

(Doc. No. 63-1 at §§ 7, 10). The Non-Circumvention Agreement provides:

Each Party ... represents [*14] and warrants that it shall not conduct business with any Personal Relationships of the Disclosing Party ... without the express written permission (not to be unreasonably withheld) of the Disclosing Party who made the source(s) known and/or available to the Recipient.

³ See [State ex rel. Hirst v. Black, 46 Del. 295, 299, 7 Terry 295, 83 A.2d 678, 681 \(1951\)](#) ("It is, of course, axiomatic that a contract may incorporate by reference provisions contained in some other instrument. ... Matters contained in other writings which are referred to may be regarded as a part of the contract and may, therefore, properly be considered in the interpretation of the contract. Where a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties.").

(Doc. No. 63-2 at § 4). As discussed in Section III.B.i., *supra*, §§ 7 and 10 of the Distribution Agreement operate together. The Non-Circumvention Agreement adds a separate requirement when the manufacturer of a covered product is also a "Personal Relationship" of one of the parties.⁴ In that scenario, the merged agreement allows TannerGAP or TPUK to enter a direct contract (1) so long as it maintains the parties' 50% profit share arrangement, (2) once directed by FSMS, and (3) with FSMS's express written permission. Therefore, to state a claim for breach of the Non-Circumvention Agreement, FSMS may allege that Defendants failed to secure "express written permission" before contracting directly with Orient Gene.

Defendants' final objection relates to FSMS's "express written permission," and it too fails. TPUK and TannerGAP argue that, in the event the Non-Circumvention Agreement operates, they performed [*15] under that agreement because FSMS gave TPUK its express written permission to contract with Orient Gene.

TPUK and TannerGAP first claim that the Distribution Agreement constitutes "express written permission" because it allows Defendants to enter into direct contracts under certain financial conditions. Such an interpretation leads to an absurd result: if the Distribution Agreement extends unlimited permission for direct contracts, then the "express written permission" is meaningless. The Court need not entertain such illogical constructions. See [Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1160 n.21 \(Del. 2010\)](#) ("[I]f a contract was susceptible of two constructions, one of which would produce an absurd result and the other of which would carry out the purpose of the agreement, the latter construction should be adopted.") (quoting [Born v. Hammond, 218 Md. 184, 146 A.2d 44, 47 \(1958\)](#)).

Finally, TPUK and TannerGAP argue that certain WhatsApp messages between FSMS and Defendants establish "express written permission."⁵ Any permission exhibited in these messages, (Doc. No. 77-21), relates to Defendants' request for administrative setup, not to a request to "conduct business" without FSMS's involvement. FSMS, therefore, states a claim for breach of the Non-Circumvention Agreement and survives the motion to [*16] dismiss on that claim.

iii. FSMS Fails to State a Claim Under [N.C. Gen. Stat. § 75-1.1, et seq.](#)

To state a claim for violation of the [North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, et seq.](#), a plaintiff must show: (i) that the defendant engaged in an unfair or deceptive act or practice; (ii) the act or practice was in or affecting commerce; and (iii) the act proximately caused injury to the plaintiff. [Tasz, Inc. v. Indus. Thermo Polymers, Ltd., 80 F. Supp. 3d 671, 685 \(W.D.N.C. 2015\)](#) (citing [N.C. Gen. Stat. § 75-1.1](#) (2011)). Because FSMS fails to allege facts showing that Defendants engaged in an unfair or deceptive act or practice, FSMS's UDTPA claim fails.

"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," and a "practice is deceptive if it has the capacity or tendency to deceive." [Bumpers v. Comm. Bank of N. Va., 367 N.C. 81, 747 S.E.2d 220, 228 \(2013\)](#). Whether a commercial act or practice is unfair or deceptive is a question of law. [Norman Owen Trucking, Inc. v. Morkoski, 131 N.C.App. 168, 506 S.E.2d 267, 273 \(1998\)](#).

⁴The Non-Circumvention Agreement defines "Personal Relationship": "FSMS has relationships with manufactures of various personal protection equipment ("PPE") including, but not limited to, sanitizer products, gloves, masks, gowns, goggles and diagnostic rapid tests, and TANNER has relationships with healthcare distributors who purchase such products and the Parties desire to form a business relationship to sell PPE to such consumer retailers. Such relationships are considered **Personal Relationships** to each Party." (Doc. No. 63-2).

⁵"Consideration of a document attached to a motion to dismiss ordinarily is permitted only when the document is integral to and explicitly relied on in the complaint, and when the plaintiffs do not challenge the document's authenticity." [Zak v. Chelsea Therapeutics Int'l, Ltd., 780 F.3d 597, 606-07 \(4th Cir. 2015\)](#). The communications referenced here are quoted in the Amended Complaint, relied upon by FSMS in the Amended Complaint, and challenged by no party.

Plaintiffs cannot, however, "piggyback" their UDTPA claims on the backs of breach of contract actions, [Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 347 \(4th Cir. 1998\)](#), because "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under the UDTPA." [Nike USA Inc. v. WDP Soccer Inc., No. 3:18-CV-374-RJC-DSC, 2018 U.S. Dist. LEXIS 152866, 2018 WL 4289653, at *4 \(W.D.N.C. Aug. 10, 2018\)](#). Instead, in the context of a contractual relationship, a party must allege "substantially aggravating and egregious circumstances attending the [*17] breach." [Foodbuy, LLC v. Gregory Packaging, Inc., 987 F.3d 102, 121 \(4th Cir. 2021\)](#) (applying North Carolina law). Such aggravating circumstances may include: "(1) lying and concealing a breach combined with acts to deter further investigation; and (2) intentional deception for the purpose of continuing to receive the benefits of an agreement." *Id.*

In applying these standards, the Magistrate Judge found that, though FSMS does allege Defendants "were not initially transparent and forthcoming," FSMS fails to identify any "substantially aggravating and egregious circumstances." (Doc. No. 110 at 47). FSMS objects to this recommendation on three grounds, arguing that Defendants engaged in "substantially aggravating and egregious" behavior by (1) signing the Distribution Agreement without intent to perform; (2) misappropriating FSMS's valuable and confidential business relationship; and (3) lying to FSMS, concealing the breach, deterring further investigation, and engaging in intentional deception to continue to receive the benefits of the Distribution Agreement. Each objection fails.

FSMS first contends that Defendants never intended to perform under the Distribution Agreement. While entering a contract with no intent to perform may constitute an unfair or deceptive [*18] trade practice, see [Software Pricing Partners, LLC v. Geisman, 3:19-cv-00195-RJC-DCK, 2022 U.S. Dist. LEXIS 156789, 2022 WL 3971292, *6 \(W.D.N.C. 2022\)](#), "partial performance under a contract is evidence of the defendant's intent to fulfill the agreement when formed." [Wellness Grp., LLC v. King Bio, Inc., No. 1:12-CV-00281-MR-DLH, 2014 U.S. Dist. LEXIS 57239, 2014 WL 1632930, at *4 \(W.D.N.C. Apr. 24, 2014\)](#). FSMS admits in its Amended Complaint that Defendants performed in part by releasing payments on February 11, 2021, April 1, 2021, and April 15, 2021, which totaled approximately \$6.5 million. (Doc. No. 58 at ¶¶ 89, 101, 102, 159). These allegations, taken as true, constitute partial performance by Defendants under the parties' contract. That partial performance demonstrates Defendants' intent to fulfill the agreement when formed.

FSMS next objects based on its contention that Defendants stole its "valuable personal relationship" with Orient Gene. (Doc. No. 111 at 17). Diversion of personal or client relationships can constitute misappropriation, see [Krawiec v. Manly, 370 N.C. 602, 610, 811 S.E.2d 542, 548 \(2018\)](#), but to state a claim for unfair and deceptive trade practices, a plaintiff must show that the misappropriation is distinct from a breach of contract claim. [Broussard, 155 F.3d at 346](#). FSMS bases its UDPTA claim on the "existence of an agreement, the terms contained in the agreement, and the interpretation of an agreement." *Id. at 347*. Such contract-based claims are "relegated to the arena of contract law," *id.* (cleaned up), and this Court [*19] will address them accordingly.⁶

Finally, FSMS argues the Magistrate Judge erred in dismissing its UDTPA claim because Defendants engaged in "substantially aggravating and egregious" deceptive conduct by: (1) concealing their relationships with Orient Gene and the UK government and (2) implying that \$5.00/unit was the test kit unit price.

Neither allegation is sufficient. FSMS alleges that Defendants entered into a contract with Orient Gene on September 23, 2020, and with the UK government on October 3, 2020. (Doc. No. 58 at ¶¶ 72, 76). When FSMS requested updates several times over the following weeks, Defendants reported that the contracts were conditioned upon the results of certain tests and that "samples have been given to uk gov for review." (*Id.* at ¶¶ 78-81). In October, Defendants notified FSMS that they were "processing a conditional transaction for Orient Gene Antigen

⁶ See also [ACS Ptnrs, LLC v. American Grp., Inc., No. 3:09CV464-RJC-DSC, 2010 U.S. Dist. LEXIS 19906, 2010 WL 883663, at *9 \(W.D.N.C. Mar. 5, 2010\)](#) (adopting memorandum and recommendation) (finding that where a plaintiff alleged unfair and deceptive trade practices based on the defendant's misappropriation of trade secrets, *i.e.*, current and prospective client relationships, plaintiff alleged only enough for a breach of contract claim, and not the sort of "substantial aggravating circumstances" necessary under the UDTPA)

Rapid Test Cassettes for the UK Government" and that "[t]he purchase is conditional upon successful Phase 3b testing by the UK Gov." (Doc. No. 77-18; Doc. No. 58 at ¶ 82).

When Defendants later advised FSMS that the tests had been verbally approved, FSMS congratulated Defendants on their "Orient Gene [*20] Antigen order from the UK Department of Health and Social Care." (Doc. No. 77-19). These relationships were no secret. Therefore, though FSMS does allege a breach of the parties' contracts, FSMS fails to demonstrate "substantially aggravating and egregious" behavior related to Defendants' contracts with Orient Gene and the UK government.

FSMS next alleges that on October 22, 2020, Defendant Scalia misrepresented the price per unit Defendants paid to Orient Gene when he reported that the numbers were "shaping up" to be "\$5/ea." (Doc. No. 58 at ¶ 82). Any alleged deception lasted only two days, however. During a follow-up call on October 24, FSMS objected to the \$5/unit price and Defendant Scalia responded that "Tanner was doing all the work on the sourcing side," so FSMS did not deserve to be paid other than at the initial sample price of \$5 per unit. FSMS noted that it could have helped secure a better price, and Defendant Scalia explained Defendants had, indeed, gotten a better price. (*Id.*).

This behavior is not "substantially aggravating and egregious." See *Foodbuy*, 987 F.3d at 121. Defendants disclosed their plan to breach the parties' contract and then carried out that plan. "[U]nfairness inheres in every [*21] breach of contract when one of the contracting parties is denied the advantage for which he contracted," but unfairness alone does not convert a breach of contract claim into a UDTPA claim. See [United Roasters, Inc. v. Colgate-Palmolive Co.](#), 649 F.2d 985, 992 (4th Cir. 1981) (affirming the district court's denial of a North Carolina unfair and deceptive trade practices claim). Accordingly, FSMS fails to plead "sufficiently aggravating and egregious" circumstances to support its unfair and deceptive trade practices claim, and, therefore, FSMS fails to state a claim under [N.C. Gen. Stat. § 75-1.1, et seq.](#)

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that:

1. The M&R, (Doc. No. 110), is **ADOPTED**;
2. The Motions to Dismiss (Doc. Nos. 62, 65, 67, 69, 71) are **DENIED IN PART**;
3. Tanner Pharma UK Limited's Rule 12(b)(2) Motion to Dismiss, (Doc. No. 62), is **DENIED**;
4. Tanner Pharma UK Limited's Rule 12(b)(6) Motion to Dismiss, (Doc. No. 65), is **GRANTED IN PART** and FSMS's Unfair and Deceptive Trade Practices Act Claims under [N.C.G.S. § 75-1.1 et seq.](#) are **DISMISSED**;
5. TannerGAP, Inc.'s Rule 12(b)(6) Motion to Dismiss, (Doc. No. 67), is **GRANTED IN PART** and FSMS's Unfair and Deceptive Trade Practices Act Claims under [N.C.G.S. § 75-1.1 et seq.](#) are **DISMISSED**;
6. Defendant Stephen John Scalia's Rule 12(b)(6) Motion to Dismiss, (Doc. No. 69), is **GRANTED**; and
7. Defendant Raymond Fairbanks Bourne's Rule 9(b) and Rule 12(b)(6) Motion to Dismiss, [*22] (Doc. No. 71), is **GRANTED**.

Signed: September 30, 2023

/s/ Robert J. Conrad, Jr.

Robert J. Conrad, Jr.

United States District Judge

- Add. 9 -

2023 U.S. Dist. LEXIS 177299, *22

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