SO ORDERED.

SIGNED this 19th day of August, 2016.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
UNIVERSITY DIRECTORIES, LLC,	)	Case No. 14-81184
Debtor.	)	
CHARLES M. IVEY, III, Chapter 7 Trustee for THE ESTATE OF UNIVERSITY DIRECTORIES, LLC;	)	
Plaintiff,	)	Adv. Pro. No. 16-09005
v.	)	
ELI GLOBAL, LLC; UDX, LLC; SOUTHLAND NATIONAL INSURANCE CORPORATION; UD HOLDINGS, LLC; SNA CAPTIAL, LLC; AROUND CAMPUS, LLC; GREG LINDBERG; and SCOTT HALL;	)	
Defendants.	)	

ORDER GRANTING IN PART, DENYING IN PART DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS

This case came before the Court on June 7, 2016, upon the Rule 12(b)(6) Motion to Dismiss, Alternative Rule 12(e) Motion for More Definite Statement, and Brief in Support (the

"Motion to Dismiss") [Doc. # 14] filed by Eli Global, LLC ("Eli Global"), UDX, LLC ("UDX"), Southland National Insurance Corporation ("Southland"), UD Holdings, LLC ("UD Holdings"), SNA Capital, LLC ("SNA Capital"), Around Campus, LLC ("Around Campus"), Greg Lindberg, and Scott Hall (collectively the "Defendants") on May 10, 2016 and the Memorandum of Law in Opposition [Doc. # 17] (the "Memorandum in Opposition") filed by Charles M. Ivey, III, Chapter 7 Trustee (the "Trustee") for the Estate of University Directories, LLC (the "Debtor") on June 3, 2016. At the hearing, Darren McDonough appeared on behalf of the Trustee, who was also present. Aaron Tobin appeared on behalf of the Defendants. After considering the Motion to Dismiss, the Memorandum of Law in Opposition, the arguments of the parties, the statements of counsel, and the record in this case, the Court finds that the Motion to Dismiss should be granted in part and denied in part for the reasons set forth herein.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334 and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina. This proceeding is comprised of core and non-core matters under 28 U.S.C. § 157.

The Defendants consent to final orders from this court, but only with regard to pretrial motions and proceedings. They do not consent to trial before the Court and reserve the right to trial by jury.[1]

BACKGROUND

[1] Since the Defendants have consented to the entry of final order with respect to this pre-trial matter, the Court need not decide whether the Defendants' actions are as efficacious as they believe. To the extent that such conditional consent is in effect hollow, or poorly disguised gamesmanship which prevents the Court from finally determining this matter, this order represents this Court's proposed findings of fact and conclusions of law for the District Court.

The Debtor is a collegiate marketing and media company, one of several closely related entities now involved in bankruptcy proceedings before the Court (the "affiliated Debtors").[2] Prior to the bankruptcy filing, the Debtor engaged an investment banker to sell its business as a going concern. Compl. ¶ 15. A number of potential purchasers expressed interest in the company, including Eli Global, a private equity company whose stated philosophy is to buy and hold companies "'for the long haul'"[.] *Id.* ¶¶ 14-15.

On August 22, 2014, the Debtor signed an agreement with Eli Global (the "Letter Agreement") to supply confidential information (the "Confidential Information") for use in evaluating a potential transaction between the parties. *Id.* ¶ 17. Eli Global agreed to use the information solely for its intended purpose and to disclose the information to its directors, officers, employees, and advisors on a need to know basis. Compl. Ex. 1. The Debtor then provided or directed others to provide the Confidential Information, defined in the Letter Agreement as information furnished by or on behalf of the company, with the exception of: (1) information already in Eli Global's possession, (2) information later made generally available to the public, and (3) information later disclosed on a non-confidential basis from a source outside the company and not known to be otherwise bound by a confidentiality agreement with the company. *Id.*

The Debtor and Eli Global further solidified their relationship less than three weeks later. On September 10, 2014, they executed a term sheet (the "Term Sheet") which stated that Eli Global, through a new company (the "Buyer"), would acquire ownership of the Debtor free and

[2] In evaluating a Rule 12(b)(6) motion, the Court must accept all well-pled allegations in the complaint as true. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). The Court has considered the exhibits attached to the complaint, *see* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."), and acknowledges the Debtor's connection with the affiliated Debtors as a matter of public record, *see Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) ("In reviewing a Rule 12(b)(6) dismissal, [the Court] may properly take judicial notice of matters of public record.").

clear of any bank debt for a purchase price of $1,750,000. Compl. ¶ 21. The Term Sheet required the Buyer to submit a $200,000 deposit upon acceptance of its terms. Compl. Ex. 2. In exchange, the Debtor agreed to let the Buyer conduct due diligence, to enter into a purchase contract with the Buyer no later than September 30, 2014, and to refrain from discussing, receiving offers from, or otherwise engaging in negotiations with other prospective buyers. *Id.*

After executing the Term Sheet, Eli Global, Mr. Lindberg, and/or the other corporate defendants formed Around Campus, LLC, UD Holdings, LLC, and UDX, LLC. Compl. ¶ 23. The Debtor notified another interested party that it had decided to accept a competitor's offer. *Id.* ¶ 22. The Debtor also advised its lender, Harrington Bank –now Bank of North Carolina ("BNC")[3]—of its agreements with Eli Global. Then it arranged a September 19, 2014 meeting between Greg Lindberg, the Manager, Chairman, and CEO of Eli Global, and Larry Loeser, the President and CEO of Harrington Bank, so the parties could discuss satisfaction of its loans at closing. *Id.* ¶¶ 27-28.

On September 22, 2014, Eli Global executed a confidentiality agreement with BNC (the "Confidentiality Agreement") at Mr. Loeser's request. *Id.* ¶¶ 30-31. Under the Confidentiality Agreement, the bank agreed to provide confidential information to Eli Global for evaluation of: (1) the potential sale of the Debtor's loans and (2) the potential sale of a loan the bank had made to Vilcom Real Estate Development, LLC ("VRD"), an affiliated Debtor. *Id.* ¶ 31. Mr. Loeser had worked with the Debtor's CEO, James Heavner, for over a decade and had also provided business and financial advice to the Debtor. *Id.* ¶ 26. He understood that the Debtor consented to communications amongst the parties in furtherance of the contemplated transaction.[4]

[3] BNC acquired Harrington Bank on June 1, 2014. It continued to operate under the name of Harrington Bank in Chapel Hill, NC. Compl. ¶ 25.
[4] This is implied. *See id.* ¶ 34.

The week before September 30, 2014, Eli Global advised the Debtor that it needed to delay closing for one month to gather additional information. *Id.* ¶ 37. The Debtor already had provided Eli Global with its State of Incorporation, Articles, Operating Agreement and capitalization documents, commercial lease agreement(s), an employee count, and all requested information about its debt with another bank, Wells Fargo. *Id.* BNC had provided all requested information about the Debtor's loans. *Id.* In light of Eli Global's stated need, the Debtor agreed to sign a revised term sheet (the "Revised Term Sheet"), delaying closing until October 31, 2014. *See id.* ¶ 38.

On September 30, 2014, Mr. Loeser retired. *Id.* ¶ 40. Danny Broach continued discussions with Eli Global on the bank's behalf. *Id.* Neither the Debtor nor Mr. Heavner had previous dealings with Mr. Broach. *Id.*

On October 10, 2014, BNC notified the Debtor that it had (1) sold the Debtor's loans to UDX and (2) sold VRD's loan to Southland National, an Eli Global portfolio company. *Id.* ¶¶ 42-43. Five days later, Mr. Lindberg presented the Debtor with a membership interest purchase agreement, proposing to transfer 100% of the membership interests in the company to UD Holdings for the sum of $1.00. *Id.* ¶ 48. Mr. Lindberg also presented VilCom Properties ("VP", another affiliated Debtor) with an agreement proposing a transfer of 100% of the membership interests in VP to SNA Capital, an entity formed by Eli Global, Lindberg, or the other defendants, for the sum of $500,504, payable in monthly installments. *Id.* ¶ 49. In the alternative, SNA Capital proposed to remit any or all of the installments to Southland National as the holder of the VRD Loan. *Id.* Both agreements were rejected. *Id.* ¶¶ 48-49.

Immediately thereafter, UDX provided three notices of default. In the first, dated October 15, 2014, UDX gave notice of acceleration of the Debtor's indebtedness and its intended

disposition of collateral. *Id.* ¶ 50. In the second, dated October 16, 2014, UDX attached copies of certain balance sheets and income statements which were furnished to Eli Global pursuant to the Letter Agreement and demanded that the Debtor provide certain financial information/documents and deliver all stock certificates and certificates of title. *Id.* In the third, dated October 20, 2014, UDX demanded that the collateral securing the Debtor's loans be marshaled and delivered to Scott Hall, President of UDX. *Id.*

The next day, UDX commenced a civil action in state court against the Debtor, VRD[5], and other related entities, seeking: (1) immediate possession of collateral securing the UD and VRD loans; (2) appointment of a receiver; (3) a temporary restraining order, preliminary injunction, and permanent injunction; (4) damages in excess of $2,000,000 in satisfaction of the indebtedness under the loans; and (5) attorney fees and costs. *Id.* ¶ 52.

To protect its assets and business operations, UD filed for relief under Chapter 11 of the Bankruptcy Code on October 24, 2014. *Id.* ¶ 56. The case was converted from a Chapter 11 to a Chapter 7 on June 18, 2015. *Id.* The Trustee filed this adversary proceeding on February 16, 2016, alleging the following causes of action: (1) breach of contract, (2) breach of the implied covenants of good faith and fair dealing, (3) unfair and deceptive trade practices, (4) equitable subordination, (5) failure to negotiate in good faith, (6) fraud in the inducement, and (7) objection to claim. In response, the Defendants filed the motion presently before the Court, seeking to dismiss the claims for breach of contract, failure to negotiate in good faith, fraud in the inducement, and objection to claim.

STANDARD OF REVIEW

[5] On October 20, 2014, VRD sent a cashier's check in the amount of $42,360.78 to Southland National. *Id.* ¶ 51. The check represented VRD's September and October monthly loan payments. *Id.* Upon receipt of payment, Southland National assigned the loan to UDX. *Id.* ¶ 52.

Under Rule 8 of the Federal Rules of Civil Procedure, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While labels, conclusions, and mere accusations are insufficient to satisfy this standard, detailed factual allegations are not required. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)).

The Defendants have moved to dismiss portions of the complaint in this case under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. In considering their motion, the Court must distinguish the facts from unwarranted or unreasonable assertions, labels, and conclusions, and "'must accept as true all of the factual allegations contained in the complaint.'" *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). "All reasonable inferences [also] must be drawn in favor of the complainant." *Id.* (internal citation omitted). Then, the Court must assess if the facts as pleaded state a plausible claim for relief in accordance with Rule 8, or "raise a right to relief above the speculative level[,]" *Twombly*, 550 U.S. at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than the sheer possibility a defendant acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). A claim is plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

LEGAL ANALYSIS

The Court will assess the sufficiency of the complaint with respect to each cause of action at issue: (1) breach of contract, (2) failure to negotiate in good faith, (3) fraud in the inducement, and (4) objection to claim.

1. Breach of Contract

The Plaintiff's first cause of action states that the Letter Agreement, the Term Sheet, and the Revised Term Sheet created legally binding and enforceable obligations, which were breached by Eli Global—or Mr. Lindberg—and "the acts by all Defendants in conspiring with Eli Global to engage in such unlawful conduct" or "a necessary finding of alter ego." Compl. ¶¶ 91-93. The Defendants attack the adequacy of this claim on three grounds.[6]

a. The Enforceability of the Term Sheet and the Revised Term Sheet

First, the Defendants argue that the Term Sheet and Revised Term Sheet (the "Term Sheets") are unenforceable, concluding that they constitute letters of intent, or mere agreements to agree. As a result, the Plaintiff cannot state a claim for their breach. *See McLean v. United States*, 566 F.3d 391, 399 (4th Cir. 2009) (explaining that Rule 12(b)(6) "'authorizes a court to dismiss a claim on the basis of a dispositive issue of law'" (citing *Neitzke v. Williams*, 490 U.S., 319, 326 (1989)). Without making any findings herein as to the ultimate viability of the claim, the Court finds that the complaint adequately states a claim for breach of the Term Sheets.

Under North Carolina law, a valid contract requires an offer, acceptance, consideration, and mutuality of assent, or a meeting of the minds. *Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 531 S.E.2d 476 (2000). "[T]he acceptance of a proposal to make a future contract, the terms of which are to be subsequently fixed, is not binding," *Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consol.*, No. 99 CVS 2459, 2003 WL 21017350, at *8, 2003 NCBC 3, ¶

[6] The Defendants orally attacked the breach of contract claim on a fourth ground at the hearing, with respect to whether the complaint states a claim for breach of the Letter Agreement. The Letter Agreement required Eli Global to: (1) protect the confidentiality of later disclosed information, and (2) use the confidential information only for its intended purpose. Compl. Ex. 1. According to the complaint, the confidential information was provided so that Eli Global could evaluate the Debtor's business for the purchase of the company as a going concern. *See id.* ¶¶ 16-18, 20. Information about the Debtor's loans was covered by the Letter Agreement. *Id.* ¶ 35. When the Defendants used information from the bank to purchase the Debtor's loans, instead of consummate the contemplated transaction with the Debtor, they breached the Letter Agreement. *Id.* ¶¶ 35, 62, 73-75, 80-81, 93. As a result of the breach, the Debtor was no longer able to sell its business as a going concern and incurred damages. *Id.* ¶ 93-94. These facts, taken as true, are sufficient to state a claim for breach of the Letter Agreement.

37 (N.C. Super. Apr. 28, 2003) (citing *Boyce v. McMahan*, 22 N.C. App. 254, 206 S.E.2d 496, *aff'd* 285 N.C. 730, 208 S.E.2d 692 (1974)). Nevertheless, certain preliminary agreements, or those which contemplate future agreements, may be enforced. *See Crockett Capital Corp. v. Inland Am. Winston Hotels, Inc.*, No. 08 CVS 0691, 2011 WL 1679431, at *15, 2011 NCBC 6, ¶ 78 (N.C. Super. Ct. Mar. 13, 2009) (unpublished) (explaining that the enforceability of a preliminary agreement depends on a number of criteria, such as "(1) whether the language of the [agreement] states that it is non-binding or otherwise demonstrates an intent not to be bound; (2) whether the [agreement] omits material terms still to be negotiated; (3) whether a certain remedy applies in the event the negotiation fails, even if there are material terms to be negotiated; (4) whether the parties are sophisticated; and (5) whether the conduct of the parties before and after the execution of the document indicates that it is binding").

The issue before the Court at this stage in the proceeding is whether the Term Sheets may be interpreted to create enforceable obligations. Each term sheet, as signed or accepted by the parties, states: "Except for paragraphs 2 and 3 this term sheet does not constitute or create, and shall not be deemed to constitute or create, any legally binding or enforceable obligation on the part of any party." Compl. Exs. 2 and 4. Under paragraphs two and three of the Term Sheets, Eli Global promised to provide a $200,000 earnest money deposit to the Plaintiff through a new company. Compl. Exs. 2 and 4. In exchange, the Plaintiff agreed to provide information requested in due diligence, work on a purchase contract, enter into a contract for sale of the company by a date certain, and refrain from discussing or entertaining other offers of purchase. Compl. Exs. 2 and 4. While contemplating a future agreement between the parties, paragraphs two and three of the Term Sheets imposed mutual obligations upon the parties which were not expressly conditioned upon this future agreement. Therefore, the Plaintiff has plausibly alleged

that the Term Sheets created legally binding obligations. The Court finds that the Defendants' request to dismiss the breach of contract claim with respect to the Term Sheets should be denied.

b. The Intended Beneficiary of the Confidentiality Agreement

Next, the Defendants argue that the Plaintiff is not a third-party beneficiary of the Confidentiality Agreement and, therefore, may not recover for breach of its terms. When two parties enter into a contract with the intent to benefit another, the latter can maintain an action in contract for its breach. *Century 21 v. Davis*, 104 N.C. App. 119, 122, 408 S.E.2d 196, 198 (1991). Intent to benefit is "discerned from the 'circumstances surrounding [a] transaction as well as the actual language of [a] contract.'" *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 652, 407 S.E.2d 178, 182 (1991) (quoting *Chemical Realty Corp. v. Home Fed. Savings & Loan*, 84 N.C. App. 27, 34, 351 S.E.2d 786 (1987)). A written contract which fails to identify a third-party beneficiary may, nevertheless, have one. *Id.* (citing Restatement (Second) of Contracts § 308). "[T]he inquiry into third-party beneficiary status is fact sensitive and not ordinarily ripe for resolution at the motion-to-dismiss stage." *Sec'y of State For Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 709 (4th Cir. 2007).

In this case, the Plaintiff asserts that the Confidentiality Agreement was entered for the Debtor's direct, rather than incidental benefit. Compl. ¶ 35. The Confidentiality Agreement does not reference the Debtor or otherwise state or imply that it is intended to benefit a third-party. Compl. Ex. 3. However, at the time of the agreement's execution, the Debtor's CEO had known Mr. Loeser for many years. Compl. ¶ 26. The Debtor discussed the sale of the company with Mr. Loeser and introduced Mr. Loeser to Mr. Lindberg so that the parties could discuss satisfaction of its loans at closing. *Id.* ¶¶ 25, 27, 28. Mr. Loeser requested that Eli Global execute the Confidentiality Agreement, *id.* ¶ 30, which was evidently signed by those who were

familiar with the proposed sale of the business, *id.* ¶ 34. Under these facts, it can be inferred that the Confidentiality Agreement, which prohibited Eli Global from disclosing or misusing sensitive financial information about the Debtor's loans, was entered for the Debtor's direct benefit. As a result, the Plaintiff has successfully pled facts to support the claim that the Debtor was an intended third-party beneficiary of the Confidentiality Agreement. The Court finds that the request to dismiss the breach of contract claim with respect to the Confidentiality Agreement should be denied.

c. Relief against the Defendants

Finally, the Defendants posit that the complaint only states a claim for breach of contract against Eli Global. The Defendants claim, in support of this assertion, that the Plaintiff has failed to adequately plead that liability may be expanded as the result of an alleged conspiracy among the Defendants or on an alter ego theory basis.[7] The Court will address each basis for expanded liability in turn.

i. Conspiracy

To state a claim for civil conspiracy under North Carolina law, a party must allege that there was: "(1) an agreement between two or more persons to commit a wrongful act; (2) an act in furtherance of the agreement; and (3) damage to the plaintiff as a result." *Eli Research, Inc. v. United Comm. Group*, LLC, 312 F.Supp.2d 748, 763 (M.D.N.C. 2004) (citing *Pleasant Valley Promenade, L.P., v. Lechmere, Inc.*, 464 S.E.2d 47, 54 (N.C. Ct. App.1995)). "[L]iability attaches as a result of the wrongful act committed, not the agreement itself." *Id.* (citing *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981)). A civil conspiracy is, in essence,

[7] The complaint clearly states, with respect to the breach of contract claim, that the "relief granted should include all Defendants as a result of the . . . [c]onspiracy" or "the acts by all Defendants in conspiring with Eli Global." *Id.* ¶¶ 91, 93. Therefore, the Court must address the conspiracy allegations as they relate to the breach of contract claim, despite the Trustee's assertion in his Memorandum in Opposition to the Motion to Dismiss that his conspiracy claim does not rest on a breach of contract theory.

an agreement to commit a tort, 15A C.J.S. Conspiracy § 1. Under North Carolina law, a breach of contract claim does not ordinarily give rise to tort liability. *N. Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 81-82, 240 S.E.2d 345, 350-51 (1978), *rejected in part on other grounds by Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 328 S.E.2d 274 (1985)); *Hardin v. York Mem'l Park*, 221 N.C. App. 317, 325, 730 S.E.2d 768, 775 (2012) (citing *Asheville Contracting Co. v. Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983)); *Spillman v. Am. Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741–42 (1992) ("[A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract."). As the North Carolina Court of Appeals has explained,

> [o]rdinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties. A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty.

Hardin, 221 N.C. App. at 325, 730 S.E.2d at 775-86.

In the complaint, the only basis upon which tort-based liability might be imposed against the individual and corporate defendants who are not party to the alleged contracts for the breach of these contracts can be found in Count III and the facts upon which it is based. Count III requests actual damages, trebled under N.C. Gen. Stat. § 75-16, as a result of the defendants' alleged unfair and deceptive trade practices—practices relating to the contracts and their breach. The Court finds that the request for damages for breach of contract against UDX, LLC, Southland National Insurance Corporation, UD Holdings, LLC, SNA Capital, LLC, Around

Campus, LLC, Greg Lindberg, and Scott Hall is in effect a duplicative attempt to request damages for unfair and deceptive trade practices against these parties.[8] Any alternative attempt to impose liability upon those other than Eli Global as a result of the alleged conspiracy to commit breach of contract has not been pled.

ii. Alter Ego

The second basis upon which the Plaintiff attempts to extend liability is the alter ego theory. Under North Carolina law, "courts will disregard the corporate form or 'pierce the corporate veil' when 'necessary to prevent fraud or to achieve equity.'" *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 439, 666 S.E.2d 107, 113 (2008) (quoting *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985)). North Carolina has adopted the instrumentality rule, which "allows for the corporate form to be disregarded if 'the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State[.]'" *Id.* at 440–41, 666 S.E.2d at 113–14 (quoting *Henderson v. Sec. Mortgage & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968)). Similarly, "[w]hen a corporation is so dominated by another corporation, that the subservient corporation becomes a mere instrument, and is really indistinct from the controlling corporation, then the corporate veil of the dominated corporation will be disregarded, if to retain it results in injustice. " *Old S. Life Ins. Co. v. Bank of N.C., N.A.*, 36 N.C. App. 18, 29, 244 S.E.2d 264, 270 (1978) (internal citation omitted). The three elements necessary to pierce the corporate veil under the instrumentality rule are:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

[8] The Defendants have not contested the plausibility of Count III of the Complaint.

> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Fischer Inv. Capital, Inc. v. Catawba Dev. Corp., 200 N.C. App. 644, 650, 689 S.E.2d 143, 147 (2009) (quoting *B–W Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966)). A non-exclusive list of factors which indicate control of a corporate or individual defendant over a corporation includes: (1) inadequate capitalization, (2) non-compliance with corporate formalities, (3) complete domination and control of the corporation so that it has no independent identity, (4) and excessive fragmentation of a single enterprise into separate corporations. *E. Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 636, 625 S.E.2d 191, 198 (2006) (quoting *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31). The presence or absence of any one factor is not dispositive. *Id.* "Rather, it is a combination of factors which . . . [can] suggest that the corporate entity attacked had 'no separate mind, will or existence of its own' and was therefore the 'mere instrumentality or tool' of the dominant [party]." *Glenn*, 313 N.C. at 458, 329 S.E.2d at 332.

According to the complaint, the corporate defendants have at least one common factor, Mr. Lindberg. *Id.* ¶ 58. At all relevant times, he was the Manager, Chairman, and CEO of Eli Global and a Member and Manager of UDX, Southland National, UD Holdings, SNA Capital, and Around Campus. *Id.* ¶¶ 59-60. Mr. Lindberg had full authority to make decisions on behalf of the corporate defendants, *id.*, who, save for Southland National, have a principal office address at 2222 Sedwick Road, Durham, NC

27713, *id.* ¶¶ 5-10. Under the theory that Mr. Lindberg masterminded the entire series of events at issue with respect to the breaches, the complaint alleges that Mr. Lindberg met with the Debtor and reviewed the Confidential Information/evaluation materials to "ascertain if he and the other Defendants could wrongfully obtain possession and control over [the Debtor]'s assets at a price below what [the Debtor] was willing to offer." *Id.* ¶ 61. Mr. Lindberg used Eli Global, a company over which he exercised complete executive control, to secure the Confidential Information and eliminate competition, then fragmented Eli Global into multiple business entities[9]—the remaining corporate defendants, over whom he also held control— which used the Confidential Information to commit the breaches. *Id.* Injury ensued. Based on these facts as stated in the complaint, the Plaintiff has plausibly alleged that the corporate defendants acted as the alter ego, or mere façade, of Mr. Lindberg, who may be liable for their actions.[10]

In the alternative, the Plaintiff has plausibly alleged that the acts of the corporate defendants related to the alleged breaches may be imputed to Eli Global, which used the corporate defendants as its alter-ego. If Mr. Lindberg was merely acting, at all times, as an agent of Eli Global, then Eli Global placed Mr. Lindberg in a position of managerial control of the other corporate defendants and used him to execute its scheme. *See id.* ¶¶ 5-10. Under this theory of agency, Eli Global disseminated otherwise confidential information to the other corporate defendants via Mr. Lindberg, delayed its anticipated closing date with the Plaintiff, directed the other defendants to purchase the loans, and then failed or refused to proceed forward with the Letter Agreements. *See id.* ¶ 54.

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[9] Under this theory, either Mr. Lindberg separately formed, or he caused Eli Global/others to form the corporate defendants, with the potential exception of Southland National. *See* Compl.¶¶ 23, 49 n. 2.

[10] *See Estate of Hurst ex rel. Cherry v. Moorehead I, LLC*, 228 N.C. App. 571, 579, 748 S.E.2d 568, 575 (2013) (explaining that the imposition of alter ego liability under the instrumentality rule may be based on a breach of contract claim).

While it is clear under the above scenarios that the acts of the corporate defendants in breaching the alleged agreements may plausibly be imputed to Mr. Lindberg or Eli Global under the theory of alter-ego, the reverse—that the acts of Mr. Lindberg or Eli Global with respect to the breach of contract claim may be imputed to the other corporate defendants—requires an analysis of outsider reverse veil-piercing. *See Rauch Indus., Inc. v. Radko*, No. 3:07-CV-197-C, 2007 WL 3124647, at *3 (W.D.N.C. Oct. 25, 2007) (defining outsider reverse veil-piercing); *Reeger Builders, Inc. v. J.C. Demo Ins. Group, Inc*., No. COA13-622, 2014 WL 859327 (N.C. Ct. App. March 4, 2014). North Carolina recognizes that the same considerations that justify piercing the corporate veil may justify piercing the veil in reverse. *See Reegers,* 2014 WL 859327, at *4-*5. Indeed, a company which is alleged to be the alter-ego of another may be forced to satisfy the obligations of the other which predated its own existence. *See id.* at *1 ("Where the trial court entered a default judgment against defendant Jeffrey C. Demo as to all of plaintiffs' claims and plaintiffs' allegations were sufficient to establish that defendant J.C. Demo Insurance Group Inc. operated as an alter-ego of defendant Jeffrey C. Demo, the trial court erred in granting defendant J.C. Demo Insurance Group Inc.'s Rule 12(b)(6) motion to dismiss."). Based on a liberal interpretation of the instrumentality test, and because the facts as stated in the complaint sufficiently contend that the corporate defendants were controlled by either Mr. Lindberg or Eli Global; that Eli Global was excessively fragmented for an improper purpose; and that the plaintiff suffered harm as a result of this excess fragmentation, the complaint also successfully states a claim against the corporate defendants for breach of contract.[11]

[11] Whether this basis for extended liability is ultimately successful depends upon the equitable merits of the requested relief. *See e.g.*, *Rauch*, 2007 WL 3124647, at *4 (noting that due to the "brevity and generality of the

The only party against which the complaint does not successfully impute liability for breach of contract on the basis of alter-ego is Scott Hall. The complaint merely states that Scott Hall is the President of UDX, Compl. ¶ 12; that he participated in a phone conversation about UDX's loan purchases, *id.* ¶ 47; that UDX demanded the collateral securing the UD loans be marshaled to him, *id.* ¶ 50(d); that he made certain untrue representations to/concealed certain facts from the Debtor, *id.* ¶¶ 52(c), 67, 68; that he executed all notices and documents with respect to UDX's civil action against the Debtor and its affiliated entities, *id.* ¶ 53; that he was referred to as "the master" of the moving parts of the possible purchase of the loans in connections with the purchase of the Debtor's business; and that he was involved in a conspiracy and may have acted beyond the scope of his employment, *id.* ¶¶ 64, 69. While Mr. Hall may have been an active participant in the events which are alleged to have transpired, Mr. Hall is not alleged to have been in complete control of, or the alter-ego of, any of the other defendants. Therefore, the complaint does not plausibly state a claim for imputing liability against Mr. Hall for breach of contract under the doctrine of alter-ego and should be dismissed as to him with respect to this claim. This is the only basis upon which the Court finds that the breach of contract claim should be dismissed.

2. Failure to Negotiate in Good Faith

The next claim for which the Defendants request dismissal under Rule 12(b)(6) is the Plaintiff's fifth cause of action, which states that the Term Sheet and Revised Term

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discussion in cases approving reverse veil-piercing claims under North Carolina law," it is unclear if a North Carolina court would allow an extended version of the doctrine beyond the cases of *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 625 S.E.2d 800 (2006), and *McLesky v. Davis Boat Works, Inc.*, 225 F.3d 654, 2000 WL 1008793 (4th Cir.2000) (unpublished), in which non-corporate defendants had committed the legal wrongs and were the sole shareholders of the separate corporations that were the subject of the reverse piercing claims; explaining that when extending reverse veil piercing beyond the facts of these cases, a North Carolina court might "require proof that no innocent third party, such as a third-party creditor or shareholder, would suffer harm or prejudice as a consequence").

Sheet created an implied duty to negotiate in good faith. According to the Complaint, this duty was breached by Eli Global when it:

> (1) failed to inform UD that it had decided to participate in the Lindberg Global Conspiracy, (2) decided to abandon a good faith effort to prepare a purchase contract within the framework set forth in the Term Sheet and Revised Term Sheet, and (3) insisted on conditions and terms contrary to those set forth in the Term Sheet and Revised Term Sheet.

Id. ¶ 117. The Defendants request that the Court dismiss this claim, because no appellate court in North Carolina has recognized a cause of action for failure to negotiate in good faith. The North Carolina Business Court has recognized a cause of action for failure to negotiate in good faith, and this Court will do the same.

In *RREF BB Acquisitions, LLC v. MAS Props., LLC*, No. 13 CVS 193, 2015 WL 3646992, at *20, 2015 NCBC 58, ¶ 88 (N.C. Super. June 9, 2015) (unpublished), *aff'd on other grounds on reconsideration,* 2015 WL 7910510, 2015 NCBC 105 (Dec. 3, 2015), the North Carolina Business Court, established by the North Carolina legislature to hear and determine complex business cases, noted that it saw "no reason that an [implied] agreement to continue negotiating in good faith would not be enforceable, provided that it met all of the requirements for contract formation under North Carolina law."[12] In other words, the *RREF* Court followed the modern trend in contract law and "recognize[d] a claim based on a 'binding preliminary agreement' between parties to continue negotiations in good faith without being bound to ultimately agree on a contract," *id.* at *18, 2015 NCBC 58, ¶¶ 83-88 (summarizing *Burbach Broad. Co. of Del. V. Elkins Radio Corp.*, 278 F.3d 401, 407-09 (4th Cir. 2002) (interpreting West Virginia law)). The

[12] The *RREF* decision addressed cross-motions for summary judgment. The North Carolina Business Court found that there were material facts at issue with respect to "whether the parties entered in an agreement to continue negotiating in good faith, and whether [one of the Defendants] breached such an agreement[.]" *RREF*, 2015 WL 3646992, at *20, 2015 NCBC 58, ¶ 88. Therefore, it denied the requests for summary judgment on this claim, reflecting only that the "Defendants' claim for breach of a duty to negotiate in good faith m[ight] be viable." *Id.*

RREF decision establishes sufficient North Carolina precedent upon which to recognize a cause of action for failure to negotiate in good faith.

As previously discussed herein, the Plaintiff has stated a claim for breach of the Term Sheets, which may not have bound the parties to "their ultimate contractual objective"—the sale of the business—but may have bound them to "negotiate the open issues in good faith in an attempt to reach the contractual objective within the agreed framework," *Burbach*, 278 F.3d at 407. Therefore, the Court will not dismiss the fifth cause of action, which has been properly pled.

d. Fraud in the Inducement

The Plaintiff's sixth cause of action states that Eli Global, Mr. Lindberg, and Mr. Hall made misrepresentations or concealed material facts from the Debtor which were reasonably calculated to deceive, made with the intent to deceive, and did in fact deceive, resulting in damages. These allegations mirror the elements necessary to state a claim for fraud in the inducement of a contract, which also requires the representations or concealments to be of a "material fact." *See Media Network, Inc. v. Long Haymes Carr, Inc.*, 678 S.E.2d 671, 684, 197 N.C. App. 433, 453 (2009).

Under the heightened pleading requirements for fraud under Rule 9 of the Federal Rules of Civil Procedure, circumstances constituting an alleged fraud must be pled with particularity, including "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir.2008) (citation and internal quotation marks omitted); *see also TSC Research, LLC v. Bayer Chems. Corp.*, 552 F. Supp. 2d 534, 543 (M.D.N.C. 2007) (stating, essentially, the same).

The Complaint does not set out the facts supporting each of the required elements for fraud in the inducement in an easily digestible fashion, instead relying on incorporation of the preceding 119 paragraphs of the complaint to state a claim. While generally undesirable, with the potential to run afoul of the general rules of pleading under Rule 8 of the Federal Rules of Civil Procedure, such a course of action nevertheless does not preclude survival in this case under Rule 12(b)(6).

The Plaintiff essentially alleges that the misrepresentations or concealments concerned Eli Global's true reasons for negotiating with the Debtor—to what end it entered into the Letter Agreement, the Term Sheet, and/or the Revised Term Sheet—and the actions it took with respect to the loans, while representing (through Mr. Lindberg or Mr. Hall) to the Debtor that it was conducting due diligence for the purchase of the Debtor's business as a going concern. More specifically, the complaint alleges that during the time of the business dealings and in relation therewith, "Lindberg and Eli Global represented to UD and Heavner . . . that Eli Global wanted access to . . . [e]valuation [m]aterial and [c]onfidential [i]nformation . . . solely for the purpose of purchasing UD as an on-going business interest for the fair price set out in the Term Sheet and Revised Term [S]heet," Compl. ¶ 63; further represented that they "saw UD as a valuable company and asset" (worth at least $1,750,000,00 as a going concern, plus the amount of outstanding accounts payable) and "were excited about purchasing UD and appreciated the opportunity to continue building the Around Campus business," *id.* ¶ 65; and "advised and represented to UD [during the week prior to September 30, 2014] that [Eli Global] needed to delay the closing for an additional month in order to assemble the information necessary for closing", *id.* ¶ 37, while omitting to disclose that they were attempting to purchase the loans, instead, *see id.* ¶ 62. These statements or omissions were material, because they concerned

matters which heavily influenced the Debtor's initial and continued dealings with Eli Global. *See, e.g.*, Compl. ¶ 16; *see also Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010) (explaining that a matter is material when it influence's another's decision to act). Moreover, the Plaintiff clearly indicates what was obtained with these misrepresentations or omissions, including access to confidential information, an ability to purchase the loans for an extended time without fear of competition, and a passive, unsuspecting Debtor which disregarded another offer to purchase its assets as a going concern. *See, e.g.*, Compl. ¶¶ 20, 21, 22, 24, 28, 29, 35, 37, 38, 45. Indeed, it is alleged and can be inferred from the overall allegations contained in the complaint that the misrepresentations or omissions were reasonably calculated to deceive and made with intent to deceive. *See Food Lion, LLC v. Schuster Marketing Corp.*, 382 F. Supp. 2d 793, (E.D.N.C. 2005) (explaining that intent may be averred generally under Rule 9(b) of the Federal Rule of Civil Procedure). That the Debtor was in fact deceived can be reasonably inferred from its course of conduct, *see, e.g.*, *id.* ¶ 73, and its desire to in fact sell the business as a going concern, *id.* ¶¶ 15-16. Finally, the Plaintiff alleges that the Debtor sustained damages as a result of the misrepresentations and concealments, including a diminution in value of assets. Therefore, the complaint sufficiently states a claim for fraud in the inducement, and the Defendants' request to dismiss this claim should also be denied.

e. Objection to Claim

The Plaintiff's final request for relief is an objection to claim number 47 filed by UDX for the debts owing on the loans. The objection requests that the claim be disallowed under 11 U.S.C. § 502 (b), as having been "procured by misrepresentation, concealment of material facts, unfair and deceptive actions, and failures to act in good faith." *Id.* ¶ 124. In the alternative, the

Plaintiff requests that the Court treat any allowable claim as unsecured, or setoff the claim. *See id.* ¶¶ 125-26. The Court finds that the Plaintiff has not adequately stated an objection to claim.

The claims allowance process is governed by 11 U.S.C. § 502. A proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). Section 502(b) lists the grounds upon which an objection to claim may be based. *Id.* The Complaint does not specify under which ground the Plaintiff's objection is based. The Court is also unaware of any general law in North Carolina that would negate an undisputed debt of the type at issue here. Therefore, the Court finds that the final request for relief, the claim objection, should be dismissed.[13]

CONCLUSION

For the reasons as stated above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

(1) the Motion to Dismiss is granted as to the Plaintiff's claim for breach of contract against Scott Hall and otherwise denied as to the claim for breach of contract;

(2) the Motion to Dismiss is denied as to the Plaintiff's claim for failure to negotiate in good faith;

(3) the Motion to Dismiss is denied as to the Plaintiff's claim for fraud in the inducement; and

(4) the Motion to Dismiss is granted with respect to the objection to claim.

[END OF DOCUMENT]

[13] This finding is without prejudice to the Trustee filing an objection to claim and/or request for setoff in a separate proceeding.

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