STATE OF NORTH CAROLINA

DAVIE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 367

BRAKEBUSH BROTHERS, INC. AND HOUSE OF RAEFORD FARMS,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON - NOVAE 2007 SYNDICATE SUBSCRIBING TO POLICY WITH NUMBER 93PRX17F157, HALLMARK SPECIALTY INSURANCE CO., EVANSTON INSURANCE CO., MAXUM INDEMNITY CO., HUDSON SPECIALTY INSURANCE CO., LIBERTY SURPLUS INSURANCE CORPORATION, IRONSHORE SPECIALTY INSURANCE CO., AND CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON -BRIT SYNDICATE 2987 SUBSCRIBING TO POLICY WITH NUMBER PD-l0972-00,

Defendants.

ORDER AND OPINION ON PLAINTIFF BRAKEBUSH BROTHERS, INC'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' AMENDED COUNTERCLAIMS

THIS MATTER comes before the Court on Plaintiff Brakebush Brothers, Inc.'s ("Brakebush") Motion for Summary Judgment on Defendants' Amended Counterclaims ("Motion" or "Motion for Summary Judgment," ECF No. 193).

THE COURT, having considered the Motion, briefs, exhibits, affidavits, depositions, arguments of counsel, and all other appropriate matters of record, **CONCLUDES** that the Motion for Summary Judgment should be **DENIED**.

Kilpatrick Townsend & Stockton LLP, by Susan H. Boyles, and Dorsey & Whitney LLP, by Vernle C. Durocher Jr., Eric J. Weisenburger, and Kathryn A. Johnson, for Plaintiffs Brakebush Brothers, Inc. and House of Raeford Farms.

Nelson Mullins Riley & Scarborough LLP, by G. Gray Wilson and Linda L. Helms, and Tressler LLP, by Timothy M. Jabbour, Anthony M. Tessitore, and Kiera L. Fitzpatrick, for Defendants Certain Underwriters at Lloyd's of London – Brit Syndicate 2987, Evanston Insurance Company, Maxum Indemnity Company, Hudson Specialty Insurance Company, Liberty Surplus Insurance Corporation, and Ironshore Specialty Insurance Company.

Butler Weihmuller Katz Craig LLP, by Clark Schirle, L. Andrew Watson, and Khrystyne Smith, for Defendant Certain Underwriters at Lloyd's of London Novae 2007 Syndicate.

Akerman LLP, by Bryan G. Scott and Jasmine M. Pitt, for Defendant Hallmark Specialty Insurance Company.

Davis, Judge.

INTRODUCTION

1. On the one hand, an insured in North Carolina commits fraud by willfully concealing or misrepresenting a material fact or circumstance in connection with a claim for fire damage. On the other hand, a genuine dispute between the insurer and the insured over the proper valuation of property destroyed or damaged in a fire does not constitute fraud. Although these two propositions are easily stated, the line between them in a particular case can sometimes be blurry. This is such a case.

FACTUAL AND PROCEDURAL BACKGROUND

2. "The Court does not make findings of fact on motions for summary judgment; rather, the Court summarizes material facts it considers to be uncontested." *Hyosung USA Inc. v. Travelers Prop. Cas. Co. of Am.*, 2021 NCBC LEXIS 115, at **3 (N.C. Super. Ct. Dec. 16, 2021) (cleaned up).

3. This lawsuit concerns a fire at a chicken processing plant owned by Brakebush in Mocksville, North Carolina. At the time of the fire, the plant was insured for fire damage under a *primary* insurance policy with limits of $20 million (all of which have been paid to Brakebush) as well as under *excess* policies issued by each of the Defendants—eight insurance companies. (ECF Nos. 44.8–15, 194.8.) Brakebush's claims against Defendants in this action are based on its belief that the amount of insurance proceeds it received under the primary policy did not fully cover the damage from the fire, therefore triggering the coverage provided under the eight excess policies.

4. Defendants' counterclaims, however, are the focus of the present Motion. In these counterclaims, Defendants allege that Brakebush fraudulently submitted a fire insurance claim that sought the recovery of insurance proceeds in an amount that grossly exceeded the value of—and in some instances were wholly unrelated to—the actual fire damage to the plant.

5. On 5 December 2022, the Court entered an opinion denying Brakebush's motion to dismiss Defendants' counterclaims, as amended, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. (ECF No. 184.) Having determined in that ruling that Defendants' counterclaims were sufficiently pled, the Court must now decide—based on a fully developed factual record—whether they can survive Brakebush's Motion for Summary Judgment.

6. The Court need not provide an exhaustive summary of the facts giving rise to this lawsuit, as they are set out in full in prior opinions of the Court. (*See*, *e.g.*,

ECF Nos. 93, 184.) Instead, the Court recites below those facts that are pertinent to the present Motion.

7. The subject fire occurred on 14 December 2017. (J.S. Held Report 24 Jan. 2020, ECF No. 194.3, at p. 5.) The central location of the fire was the plant's boiler room. (J.S. Held Report, at p. 5.) Initial damage estimates indicated that 10,000 square feet of the facility required demolition and replacement. (Eplee Report, ECF No. 204.5, at p. 9.) That estimate later increased to 20,000 square feet. (Eplee Report, at p. 9.) Prior to the fire, the plant consisted of 73,177 square feet. (Eplee Report, at p. 5.)

8. At the time of the fire, the plant was owned by House of Raeford Farms[1] ("Raeford"), who subsequently sold the plant to Brakebush. Brakebush and Raeford finalized the sale through an Asset Purchase Agreement ("APA") that was executed on 3 July 2018. (APA, ECF No. 194.12.) The sale price was $16 million, consisting of $13 million cash and an additional $3 million in subsequent payments. (Brakebush 30(b)(6) Dep.–Huff, ECF No. 204.39, at 116:14–23.) At the time Brakebush assumed ownership of the facility, the effects of the fire remained.

9. The APA transferred to Brakebush "[a]ll insurance benefits, including rights and proceeds, related to the Fire Event and/or the Rebuild and the Mocksville Business[.]" (APA § 1.1(j).) The primary policy, as to which the excess policies "follow form," provided that in the event of an insurable loss "[b]uildings, structures, furniture and fixtures, equipment, improvements and betterments, shall be valued

[1] Although Raeford is a co-Plaintiff in this case, Defendants' counterclaims are asserted only against Brakebush.

at the replacement cost new with like kind and quality on the same premises, as of the date of replacement." (Primary Policy, ECF No. 194.8, at 00108.) At the time of the execution of the APA, Raeford estimated that the costs related to the fire damage were between $16 and $17 million. (Raeford 30(b)(6) Dep., ECF No. 204.43, at 202:20-203:9.)

10. Prior to the sale of the plant to Brakebush, Kenneth Qualls, the treasurer and chief financial officer of Raeford, would periodically submit a statement of values to an insurance broker stating the replacement cost value of the Mocksville facility. (Raeford 30(b)(6) Dep, at 49:13–18; 129:13–133:4.) This replacement cost value, which included the value of the building itself and the equipment therein, was amended each year based on improvements to the facility. (Raeford 30(b)(6) Dep., at 132:24–133:6; 138:18–25.) The record contains a document referencing a $27,543,632 total replacement cost value of the plant—apparently referring to the value shortly before the date of the fire. (Seller Disclosure Letter, ECF No. 204.10, at BB00170560.)

11. Following the fire, Defendants retained Crawford and Company ("Crawford"), a company specializing in claims administration, to adjust Raeford's (and, subsequently, Brakebush's) insurance claim. Crawford, on behalf of the primary and excess insurers, hired a company called J.S. Held to evaluate the fire loss. (J.S. Held Letter, ECF No. 194.7.) J.S. Held employees conducted a detailed site analysis of the fire damage to the facility. (J.S. Held Report Excerpts, ECF No. 204.9.) A 19 June 2018 report from Crawford included an "Estimated Gross Loss" of $16,374,501. (Seller Disclosure Letter, at BB00170558.)

12. At some point after becoming the owner of the plant, Brakebush began the process of obtaining insurance proceeds under the primary policy. In or around 2020, the primary carrier—Certain Underwriters at Lloyd's of London—issued payment to Brakebush in the amount of $20 million under that policy, which exhausted the coverage limits thereunder.

13. Following its purchase of the plant, Brakebush decided that in addition to rebuilding the portions of the facility destroyed by the fire, it would also significantly expand and upgrade the Mocksville plant—a plan that was to be funded, in part, by the insurance proceeds that it anticipated receiving from Raeford's insurers.

14. In an initial presentation to the company's Board of Directors ("Board") on 17 August 2018, Scott Sanders, Brakebush's president, stated that the anticipated amount of insurance proceeds would be approximately $20 million. (Sanders Presentation, ECF No. 204.35, at BB00213130.)

15. In July 2018, Brakebush executive Carey Brakebush ("Carey") estimated the cost of the planned plant expansion to be $52 million. (RE: Mocksville Spend Emails, ECF No. 204.11.)

16. In a Board meeting on 15 November 2018, Sanders stated that Brakebush anticipated receiving around $13 million in insurance proceeds within days with a "final anticipated total" of insurance payments of "no less than $25 [million]." (Sanders President Update, ECF No. 204.36, at BB00213189.)

17. However, project costs for the expansion project proceeded to balloon over the next two years. On 15 February 2019, Carey told the Board the project would cost between $60 and $65 million "before insurance reimbursements." (Board of Directors Minutes 15 Feb. 2019, ECF No. 204.12, at BB0180336.)

18. Terri Jaster, a Brakebush accountant, testified that she was tasked in June 2018 to "monitor all the incoming invoices to make sure they were accurate and log those in [a] spreadsheet" in connection with "the rebuild of the plant[.]" (Jaster Dep., ECF No. 204.44, at 35:15–37:21.) On 8 July 2019, Jaster sent company officials an updated report estimating the project costs to be $61.9 million. (Re: Mocksville Update Emails, ECF No. 204.21, at BB00052364; Spreadsheet Attachment, ECF No. 204.20.)

19. Approximately one month later, Carey reported at a 15 August 2019 Board meeting that the costs of the project would reach $108 million. (15 August 2019 Board Minutes, ECF No. 204.14, at BB00199449.)

20. At a presentation at a November 2019 Board meeting, that figure was estimated to be $120 million. (15 November 2019 Board Minutes, ECF No. 204.23, at BB00166458.)

21. During the period of time in which the fire damage was being repaired in conjunction with the ongoing expansion project, Brakebush representatives had a number of conversations with employees of Crawford and J.S. Held about the extent to which Defendants' insurance policies would provide coverage for certain categories of costs. During these conversations, Carey was expressly told that insurance would

not cover costs unrelated to areas of the facility actually damaged by the fire. (Simones Dep., ECF No. 204.38, at 86:5–89:24.)

22. During the expansion project, Jaster and several other Brakebush employees examined a pre-fire asset list from Raeford and classified items on that list based on whether they had been damaged, sold, demolished, or scrapped. (Jaster Dep., at 59:12–66:22.) Jaster color-coded the asset list to reflect the status of each asset after the fire. (Jaster Dep., at 62:14–25.) However, Jaster testified that to her knowledge no one at Brakebush ever used the asset list to determine the replacement cost of the pre-fire assets in preparing the insurance claim. (Jaster Dep., at 66:11–22.) Indeed, the record does not appear to contain any evidence that Brakebush ever actually prepared an estimate of what it would cost to replace the rooms and equipment damaged in the fire with like kind and quality. (Brakebush 30(b)(6) Dep.–Huff, at 224:22–225:3; Sanders Dep., ECF No. 204.40, at 59:6–60:14; Brakebush 30(b)(6) Dep.–Carey Brakebush, ECF No. 204.41, at 71:7–72:25, 139:10–19.)

23. On 3 February 2020, Brakebush submitted by email to Defendants' representatives its "final claim submission for the Mocksville project." (Final Claim Spreadsheet, ECF No. 194.14.; Final Submission Email, ECF No. 194.15.)

24. The 3 February submission was not in the form of a typical fire insurance claim. Instead, it consisted, in part, of a two-page spreadsheet titled "Summary for Mocksville Projects" that contained approximately twenty-nine line items related to the expansion project with various columns showing—for each line item—certain information such as the amount of money approved for that line item

and the status of payments actually made as of that date. At the far right of the spreadsheet was a column labelled "Insurance $."[2] Listed underneath that heading were dollar amounts indicating the specific amount of insurance proceeds Brakebush was seeking for particular line items contained on the spreadsheet. For some of the line items, the amount of insurance proceeds sought equaled the full cost of that line item. For others, the amount sought was a portion of the total cost of the line item. For a few of the line items, no insurance amount was listed at all.

25. The bottom of the spreadsheet listed "Project Totals" that added up the entries under each column. With regard to the "Insurance $" column, the amount of $41,274,429.13 was listed, which represented the total amount of Brakebush's insurance claim. The spreadsheet also stated that Brakebush's total financial commitments to the plant expansion were in the approximate amount of $100 million. (Final Claim Spreadsheet.)

26. Accompanying the two-page spreadsheet were approximately 300 pages of supporting documentation. These 300 pages largely consisted of summaries of specific associated invoices relating to the expansion project and the related spending commitments made by Brakebush. In some places, percentage values were listed, which appear to represent the amounts that were being allocated to insurance.

27. It is undisputed that in early June 2020, Defendants paid $4,221,465.83 to Brakebush under their excess policies pursuant to an express reservation of rights.

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[2] The other columns were titled "Approved Proj," "Proj Commitments," "Overspend," "Approved Proj Balance," "Payments," and "Balance of Payments." (Final Claim Spreadsheet.)

However, after Brakebush and Defendants failed to reach agreement on the total amount of additional insurance proceeds to which Brakebush was entitled under the excess policies, Brakebush initiated the present lawsuit by filing a Complaint in Davie County Superior Court. (Compl., ECF No. 3.) In its Complaint, Brakebush asserted a claim for declaratory judgment regarding Defendants' remaining obligations under their policies along with claims for breach of contract, bad faith, and unfair and deceptive trade practices. (Compl. ¶¶ 47–49.)[3]

28. After previously filing initial answers and counterclaims, on 12 and 18 August 2022, Defendants filed the amended counterclaims (the "Counterclaims") that form the basis for the present Motion.[4] In the Counterclaims, Defendants have asserted claims for declaratory judgment and for recoupment/unjust enrichment. The declaratory judgment claim requests a determination from the Court that Brakebush's fire insurance claim was fraudulent such that Defendants are not required to pay Brakebush any fire damage proceeds at all under their policies. The claim for recoupment/unjust enrichment seeks an order requiring Brakebush to return to each Defendant its pro rata share of the $4,221,465.83 that was paid to Brakebush in June 2020. (ECF Nos. 152–154.) The Counterclaims are all based on Defendants' assertion that Brakebush committed statutory fraud pursuant to

[3] The Court ultimately dismissed the bad faith and unfair and deceptive trade practices claims. (ECF No. 130, at ¶ 50.) In addition, Brakebush subsequently filed an Amended Complaint naming Raeford as an additional Plaintiff in this action. (Am. Compl., ECF No. 100.)

[4] To be precise, Defendants have filed three sets of counterclaims, but the allegations contained within each set are virtually identical.

N.C.G.S. § 58-44-16(f)(2) by intentionally submitting a claim seeking insurance proceeds for costs well beyond those legitimately connected to the fire damage at the plant.

29. Brakebush subsequently moved to dismiss the Counterclaims, and on 5 December 2022 the Court denied Brakebush's motion. (ECF No. 184.)

30. On 10 February 2023, Brakebush filed the present Motion for Summary Judgment as to the Counterclaims. [5] (ECF No. 193.)

31. This matter came before the Court for a hearing on 3 May 2023, and the Motion is now ripe for decision.

LEGAL STANDARD

32. It is well established that "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (quoting N.C. R. Civ. P. 56(e)). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (citation and internal quotation marks omitted).

[5] Defendants have not filed a motion for summary judgment as to Plaintiffs' remaining claims in this action.

33. On a motion for summary judgment, "[t]he evidence must be considered 'in a light most favorable to the non-moving party.' " *McCutchen v. McCutchen*, 360 N.C. 280, 286 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985).

34. The party moving for summary judgment may satisfy its burden by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of [the] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citations omitted). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369–70 (1982) (quoting N.C. R. Civ. P. 56(e)). If the nonmoving party does not satisfy its burden, then "summary judgment, if appropriate, shall be entered against [the nonmovant]." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (quoting N.C. R. Civ. P. 56(e)).

ANALYSIS

35. Brakebush argues that the evidence in this case establishes nothing more than a mere coverage dispute between an insured and an insurer over the proper valuation of property damaged in a fire and that no finding of fraud could possibly exist on these facts. Defendants, conversely, contend that they have

presented evidence that would enable a jury to find that Brakebush fraudulently sought to have Defendants fund substantial portions of the costs associated with expanding and upgrading the plant—costs that Brakebush knew were well in excess of those sums it was actually entitled to receive under the policies in connection with the fire damage.

36. N.C.G.S. § 58-44-16(f) contains a number of provisions that must be contained in fire insurance policies covering property in this State. N.C.G.S. § 58-44-16(b).[6] One of these provisions provides as follows:

> **(2) Concealment or fraud.** — This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject of this insurance, or the interest of the insured in the subject of this insurance, or in the case of any fraud or false swearing by the insured relating [to] the subject of this insurance.

N.C.G.S. § 58-44-16(f)(2).

37. There is very little case law interpreting N.C.G.S. § 58-44-16(f)(2). However, our Supreme Court has held that under a prior—and virtually identical—version of this statutory provision an insurer seeking to void a policy on the basis of a material misrepresentation "must prove that the insured made statements that were: 1) false, 2) material, and 3) knowingly and willfully made." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 370 (1985).[7]

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[6] A few specific types of fire insurance policies are exempted from these requirements, but none of those types are relevant to the present case.

[7] Brakebush's argument in support of its Motion for Summary Judgement is focused on the alleged inadequacy of Defendants' evidence with regard to the first element.

38. In the course of its analysis in *Bryant*, the Supreme Court articulated definitions of several key terms in the statute that are relevant to the present case. Notably, the Supreme Court explained that "[t]o 'willfully misrepresent' is to make a statement deliberately and intentionally knowing it to be false." *Id.* at 374 (cleaned up). Furthermore, the Supreme Court expressly stated its approval of the trial court's instructions to the jury in that case on the following elements of the insurer's statutory fraud defense: (1) that "a misrepresentation is material if the facts misrepresented would reasonably be expected to influence the decision of the [insurer] in investigating, adjusting or paying the claim"; (2) that if a false statement is knowingly made by an insured concerning a material matter, "the law infers or presumes that the insured intended to deceive the insurer"; and (3) that the jury was not required to find either that the insurer was "actually deceived, prejudiced, or injured by" the insured's fraudulent statement or that the insurer "relied or acted upon the statements of the insured to its detriment[.]" *Id.* at 370–71, 383.

39. In its briefs, Brakebush repeatedly seeks to rely on the proposition that "a mere overstatement of value of the goods or premises lost in a fire, or an error in judgment with respect to their value, is not sufficient to prove an intentional misrepresentation." *Id.* at 370.

40. In making this argument, however, Brakebush mischaracterizes the essence of Defendants' Counterclaims. Defendants are not simply asserting that a difference of opinion exists as to the proper valuation of portions of the plant damaged by the fire. Instead, they are contending that Brakebush knowingly claimed

entitlement to insurance proceeds for costs *that had nothing to do with the fire damage* in furtherance of its scheme to have Defendants fund a substantial portion of its expansion project.

41. Brakebush also misses the point when it argues that the documentation attached to the 3 February spreadsheet shows that all of the expenses reflected therein were actually incurred. Defendants' Counterclaims are not based on the premise that Brakebush submitted a claim for illusory expenses. Rather, they are based on the proposition that significant portions of those costs charged to insurance bore no relation to fire damage and were instead incurred solely in furtherance of Brakebush's decision to expand the plant.

42. Although Brakebush attempts to rely on our Court of Appeals' decision in *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365 (1983), that case does not support its argument. In *Shields*, the plaintiff insured brought an action under a fire insurance policy issued by the defendant insurer for losses resulting from fire damage. The defendant contended that the plaintiff had misrepresented material facts in connection with his insurance claim in violation of a policy provision that tracked the language of a predecessor statute to N.C.G.S. § 58-44-16(f)(2). After the jury found that the plaintiff had not submitted a fraudulent claim, the defendant appealed the trial court's denial of its motion for judgment notwithstanding the verdict—contending that the evidence supported a finding of fraud as a matter of law. *Id.* at 367–68.

43. The Court of Appeals affirmed the trial court's denial of the defendant's motion, but its analysis provides little support for Brakebush. After noting the general rule that "mere overvaluation by the insured, without more, will not avoid the policy[,]" *id.* at 369, the Court of Appeals then stated the following:

> [T]here can be no question but that . . . knowing and intentional overvaluation in the sworn proofs of loss avoids the policy under the clause against false swearing. [citations omitted.] Of course, honest mistake will not avoid the policy; and to preclude recovery the overvaluation must be of a material character and must have been knowingly and intentionally made. . . . [*O*]*rdinarily, where there is evidence from which intentional overvaluation may be inferred, the question whether it was intentional and with intent to deceive or defraud is . . . for the jury.*

Id. (quoting *Globe & Rutgers Fire Ins. Co. v. Stallard*, 68 F.2d 237, 240–41 (4th Cir. 1934)) (emphasis added).

44. Thus, *Shields* tends to support *Defendants'* argument in the present case—that is, the notion that evidence raising an inference of an insured's fraud in connection with a fire insurance claim creates a jury issue.

45. This, of course, begs the question as to whether Defendants here have actually submitted evidence sufficient to raise such an inference of fraud. The Court has carefully and thoroughly reviewed the evidence in the summary judgment record and concludes that this issue requires resolution by a jury.

46. Although it is clear that Brakebush made no effort to hide from Defendants (or their agents) the fact that it intended to embark on a project to expand and upgrade the plant at the same time the portions of the facility damaged by the fire were being renovated, this does not—as Brakebush appears to believe—

immunize it from a claim for violation of N.C.G.S. § 58-44-16(f)(2). If Brakebush deliberately claimed entitlement to insurance proceeds as part of its fire loss claim for costs unrelated to the fire damage and instead stemming solely from its desire to expand the plant, that is more than a mere difference of opinion over value between the insured and the insurer. Rather, such conduct could constitute a violation of N.C.G.S. § 58-44-16(f)(2).[8] Although a jury may or may not ultimately find that Brakebush actually engaged in such acts, the Court is satisfied that Defendants have put forth sufficient evidence to survive summary judgment on its Counterclaims—particularly in light of the broad language contained in N.C.G.S. § 58-44-16(f)(2).

47. In their opposition to Brakebush's Motion, Defendants have offered evidence from which jurors could find that Brakebush's insurance claim was not limited to costs resulting from the fire damage. For example, Timothy Eplee, who was heavily involved in the process of evaluating the fire damage on behalf of J.S. Held, testified that Brakebush had sought insurance proceeds for costs that Carey "had previously been advised would not be included in the measurement of the loss" based on their lack of connection to the fire damage. (Eplee Expert Dep., ECF No. 204.51, at 196:12–198:11; Eplee Report, at p. 3.) Among other things, Eplee testified that "electrical costs have been allocated to the insurance proceeds in areas that did not sustain damage to the electrical system." (Eplee Expert Dep., at 216:2–7.)

[8] Indeed, at the 3 May hearing, counsel for Brakebush effectively conceded that the intentional inclusion of an item on the 3 February spreadsheet (for which insurance proceeds were being sought) that was not connected with any actual fire damage—if proven— would constitute evidence supporting a violation of N.C.G.S. § 58-44-16(f)(2).

48. Similarly, Jerome Hammar, who was also engaged by J.S. Held and performed extensive work on behalf of Defendants, likewise identified arguable improprieties regarding Brakebush's submission. (Hammar Dep., ECF No. 204.49, at 23:23–24:9.) Hammar provided specific examples of items that "[Carey] Brakebush deliberately included in the insurance claim that he knew shouldn't be part of the claim[.]" (Hammar Expert Dep., ECF No. 204.50, at 112:19–113:16.) For example, Hammar testified that Brakebush's claim included costs associated with the paving of a parking lot that "had nothing to do with the [fire damage] whatsoever" yet was nevertheless made a part of Brakebush's claim. (Hammar Expert Dep., at 112:19–113:16.)

49. In addition, the record contains testimony from workers on the site regarding Brakebush's stated desire to charge "everything" to insurance. (Poplin Aff., ECF No. 204.8, ¶ 2.) For example, Kenny Poplin, a contractor formerly employed with Maynard Electric Company, testified about an incident during which Carey and David Meyer, another Brakebush representative, were touring a cook room at the plant and Carey stated to Meyer that "[w]e will charge this room to fire damage." Meyer responded by telling Carey to "hush" due to Poplin's presence. (Poplin Aff. ¶ 2.)

50. In sum, viewing the evidence in the light most favorable to Defendants as the non-moving party, the Court concludes that a factual dispute exists regarding whether Brakebush's fire loss claim contained fraudulent misrepresentations or omissions of material facts or circumstances. The parties have presented completely

opposite narratives based on the evidence in this case, and it will be up to a jury to decide between them.

CONCLUSION

THEREFORE, Brakebush's Motion for Summary Judgment as to Defendants' Amended Counterclaims is **DENIED**.

SO ORDERED, this the 30th day of May, 2023.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases