| | |
|---|---|
| STATE OF NORTH CAROLINA<br><br>GUILFORD COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>21 CVS 5216 |
| MICHAEL G. WOODCOCK, Derivatively on behalf of Fayetteville Ambulatory Surgery Center Limited Partnership,<br><br>Plaintiff,<br><br>v.<br><br>CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., and CAPE FEAR VALLEY AMBULATORY SURGERY CENTER, LLC,<br><br>Defendants.<br><br>v.<br><br>FAYETTEVILLE AMBULATORY SURGERY CENTER LIMITED PARTNERSHIP,<br><br>Nominal Defendant. | **ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' AMENDED MOTION TO STRIKE [PUBLIC][1]** |

**THIS MATTER** comes before the Court on Plaintiff Michael G. Woodcock's Motion for Summary Judgment Derivatively on Behalf of FASC Against Cumberland County Hospital System, Inc. (ECF No. 176), Defendants' Motion for Summary Judgment (ECF No. 171), and Defendants' Amended Motion to Strike (ECF No. 202) (collectively, the "Motions").

[1] Recognizing that this Order and Opinion cites and discusses the subject matter of documents that the Court has allowed to remain filed under seal in this action, the Court elected to file this Order and Opinion under seal on 18 October 2023. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. The parties did not propose any redactions. Accordingly, the Court now files the unredacted, public version of this Order and Opinion.

**THE COURT**, having considered the Motions, the briefs of the parties, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES** that Woodcock's Motion for Summary Judgment should be **DENIED**, Defendants' Motion for Summary Judgment should be **GRANTED**, and Defendants' Amended Motion to Strike should be **DENIED** as moot.

*Douglas S. Harris for Plaintiff Michael G. Woodcock.*

*K&L Gates LLP by Marla T. Reschly, Susan K. Hackney, and Daniel D. McClurg for Defendants Cumberland County Hospital System, Inc. and Cape Fear Valley Ambulatory Surgery Center, LLC.*

Davis, Judge.

## INTRODUCTION

1. This action involves a limited partnership dispute relating to Fayetteville Ambulatory Surgery Center Limited Partnership ("FASC"), which operates an ambulatory surgery center in Cumberland County. In a nutshell, the core issue in this case is whether two related transactions occurring on 1 April 2019, in which one of FASC's Limited Partners divested itself of its Limited Partner Units ("LP Units") and then purchased 100% of the equity of the General Partner, violated FASC's limited partnership agreement.

## 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." *McGuire v. Lord Corp.*, 2021 NCBC LEXIS 4, at **1–2 (N.C. Super. Ct. Jan. 19, 2021) (cleaned up).

3. FASC was formed in November 1991 as a limited partnership. (Weatherly Aff. ¶ 7, ECF No. 173.1.) Since its formation, FASC's General Partner has been an entity now known as Cape Fear Valley Ambulatory Surgery Center, LLC ("CFVASC").[2] (Weatherly Aff. ¶¶ 8–9.) FASC operates a freestanding ambulatory surgical center ("ASC"). (Lowe Aff. ¶ 5, ECF No. 173.2.)

4. Although FASC's limited partnership agreement has been amended several times, the version of the agreement relevant to this case is dated 1 October 1995 and entitled Second Amended and Restated Limited Partnership Agreement ("LPA"). (LPA, at 1, 6–7, ECF No. 3.2; Weatherly Aff. ¶ 10.)

5. At the time the 1995 LPA was executed, FASC was comprised of CFVASC as the General Partner along with twelve Limited Partners. (LPA, at Sched. A.) Those twelve limited partners included CFVASC[3], Defendant Cumberland County Hospital System, Inc. ("CCHS"), Village Ambulatory Surgery Associates, Inc. ("VASA"), and Woodcock.[4] (LPA, at Sched. A.)

---

[2] Until 17 April 2022, CFVASC was known as NSC Fayetteville, Inc. NSC Fayetteville, Inc. was a wholly owned subsidiary of a company called National Surgery Centers, LLC ("NSC"), which, in turn, was a wholly owned subsidiary of Surgical Care Affiliates, LLC ("SCA"). (Compl. Ex. 3, ECF No. 3.4; Equity Purch. Agrmt. ("E.P.A."), at 1, ECF No. 81.2 (sealed).) However, for clarity, throughout this opinion the Court will refer to FASC's General Partner as CFVASC.

[3] In addition to serving as FASC's General Partner, CFVASC also owned LP Units. (LPA, at Sched. A.)

[4] The twelve limited partners also included George Demetri, Carol Wadon, and Camille Wahbeh, who were originally plaintiffs in this action until voluntarily dismissing their claims. (LPA, at Sched. A; Wadon, Wahbeh, & Demetri Not. Vol. Dismiss., ECF No. 108.)

6. Woodcock is a physician in Cumberland County. (LPA, at Sched. A.) In addition to owning FASC LP Units, Woodcock is also a shareholder of VASA. (Lowe Aff. ¶¶ 7, 9; LPA, at Sched. A.)

7. CCHS is a North Carolina non-profit corporation that owns and operates several hospitals in the Cumberland County region, including Cape Fear Valley Medical Center and Highsmith-Rainey Hospital. (Weatherly Aff. ¶¶ 3, 5.)

8. VASA is a North Carolina corporation that is owned by a group of physicians, including Woodcock. (Lowe Aff. ¶¶ 4, 7, 9.)

9. In or around 2018, NSC made known its intent to sell the equity in CFVASC. (Weatherly Aff. ¶ 15.) Woodcock and CCHS proceeded to separately engage in negotiations with NSC. (Weatherly Aff. ¶ 16.) CCHS was the ultimate purchaser, thereby precipitating the 1 April 2019 transactions that form the basis for this lawsuit. (E.P.A., at 1; Weatherly Aff. ¶17.)

10. Immediately prior to 1 April 2019, the ownership breakdown of FASC General Partner and LP Units was as follows:

| **Name** | **Unit Type** | **# of Units** | **% of total Units** |
|---|---|---|---|
| CFVASC | GP | 99.99999989 | 43.7636761% |
| VASA | LP | 59.19092791 | 25.9041260% |
| CCHS | LP | 50.43270183 | 22.0712043% |
| Michael G. Woodcock, M.D. | LP | 10.61910792 | 4.6473120% |
| CFVASC | LP | 5.667160573 | 2.4801578% |
| Cumberland Anesthesia Associates, P.A. | LP | 1.47910792 | 0.6473120% |
| Carole M. Wadon, M.D. | LP | 0.370331321 | 0.1620706% |
| Camille J. Wahbeh, M.D. | LP | 0.185165661 | 0.0810353% |
| George J. Demetri Jr., D.P.M. | LP | 0.185165661 | 0.0810353% |
| Louis P. Clark, Jr., M.D. | LP | 0.185165661 | 0.0810353% |
| Michael S. Bryant, M.D. | LP | 0.185165661 | 0.0810353% |

| | | | |
|---|---|---|---|
| | | **228.5** | **100.0000000%** |

(Weatherly Aff. ¶ 19.)

11. On 1 April 2019, two distinct, but related, written agreements were executed. First, CCHS conveyed all of its then-owned LP Units to CFVASC by means of a document titled "Contribution Agreement" (Contrib. Agrmt., ECF 81.1 (sealed)), which purported to divest CCHS of its Limited Partner status in FASC. (Weatherly Aff. ¶ 20.) CFVASC, CCHS, and NSC were the signatories to the Contribution Agreement. (Contrib. Agrmt., at 4–6.)

12. By virtue of the Contribution Agreement, CFVASC was to remain the owner of the LP Units it already held and to also become the owner of the LP Units that were being "contributed" by CCHS. (Contrib. Agrmt., at 1.) In addition, the Contribution Agreement stated as follows:

> Immediately following the consummation of the Conveyance in accordance with the terms and conditions contained herein, [CCHS] has agreed to purchase from [NSC], and [NSC] has agreed to sell to [CCHS], all of the [CFVASC] Equity owned by [NSC] for the consideration and on the terms and subject to the conditions set forth in that certain Equity Purchase Agreement, by and among the Parties, dated as of the Effective Date (the "**Purchase Agreement**"). Immediately following the Conveyance and the consummation of the transactions contemplated by the Purchase Agreement, [CCHS] will (a) directly own all of the [CFVASC] Equity and (b) indirectly, through its ownership of the [CFVASC] Equity, own (i) all of the General Partner Units of FASC and (ii) 56.09986239 Limited Partner Units of FASC.

(Contrib. Agrmt., at 1 (emphasis in original).)

13. Immediately thereafter, a second document, the "Equity Purchase Agreement" (the "E.P.A.") was executed.[5] (E.P.A., ECF No. 81.2 (sealed).) The signatories to the E.P.A. were, once again, CFVASC, CCHS, and NSC. (E.P.A., at 26–28.)

14. The E.P.A. stated that CCHS was purchasing from NSC 100% of the equity of CFVASC. (E.P.A., at 1.) The E.P.A. further provided that, as a result, CCHS would "(a) directly own one hundred percent (100%) of the Equity of [CFVASC] and (b) indirectly, through its ownership of [CFVASC], own (i) one hundred percent (100%) of the 'General Partner Units' of FASC and (ii) 43.6574805% of the 'Limited Partner Units' of FASC[.]" (E.P.A., at 1.)

15. Following the completion of the April 2019 Transactions, the ownership breakdown of FASC's General Partner and LP Units was as follows:

| **Name** | **Unit Type** | **# of Units** | **% of total Units** | **% of LP Units** |
|---|---|---|---|---|
| CFVASC | GP | 99.99999989 | 43.76368% | ---[N/A]--- |
| VASA | LP | 59.19092791 | 25.90413% | 46.06298% |
| CFVASC | LP | 56.0998624 | 24.55136% | 43.65748% |
| Michael G. Woodcock, M.D. | LP | 10.61910792 | 4.64731% | 8.26390% |
| Cumberland Anesthesia Associates, P.A. | LP | 1.47910792 | 0.64731% | 1.15106% |
| Carole M. Wadon, M.D. | LP | 0.370331321 | 0.16207% | 0.28820% |
| Camille J. Wahbeh, M.D. | LP | 0.185165661 | 0.08104% | 0.14410% |
| George J. Demetri Jr., D.P.M. | LP | 0.185165661 | 0.08104% | 0.14410% |
| Louis P. Clark, Jr., M.D. | LP | 0.185165661 | 0.08104% | 0.14410% |
| Michael S. Bryant, M.D. | LP | 0.185165661 | 0.08104% | 0.14410% |
| | | **228.5** | **100.00%** | **100.000%** |

(Weatherly Aff. ¶ 24.)

[5] Throughout this Opinion, the Court refers collectively to the Contribution Agreement and E.P.A. as the "April 2019 Transactions."

16. Accordingly, after the April 2019 Transactions, CCHS no longer directly owned any FASC LP Units. (Weatherly Aff. ¶ 26.)[6]

17. In this lawsuit, Woodcock challenges the validity of the April 2019 Transactions and argues that CCHS "does not have lawful authority to own 100% of the equity of [CFVASC] or to exercise any authority over [CFVASC]." (Compl. ¶ 146.)

18. Essentially, Woodcock contends that the April 2019 Transactions breached various provisions of the LPA and that the methods utilized to effectuate the transactions were purposefully crafted to sidestep certain restrictions contained within the LPA. (Compl. ¶¶ 18–29.)

19. The same factual background forming the basis for the present action was the subject of a prior lawsuit filed by Woodcock (along with several of the other Limited Partners of FASC) against CCHS and CFVASC. *See Woodcock v. Cumberland Cty. Hosp. Sys., Inc.*, Case No. 2019-CVS-8790 (Guilford Cty. N.C. Super. Ct.) (the "Prior Lawsuit"). The Prior Lawsuit was voluntarily dismissed without prejudice by the plaintiffs pursuant to Rule 41 of the North Carolina Rules of Civil Procedure on 24 November 2020. (Pls.' Voluntary Dismiss. Without Prejudice Pursuant R. 41(a)(1), Prior Lawsuit, ECF No. 85.)

20. On 11 May 2021, Woodcock, Carol Wadon, Camille Wahbeh, and George Demetri (all limited partners of FASC) initiated the present action by filing a new Complaint in Guilford County Superior Court against CCHS, CFVASC, SCA, and

[6] Since the April 2019 Transactions, there have been no further changes in the ownership of FASC. (Weatherly Aff. ¶ 25.)

NSC.[7] The Complaint contained a combination of claims brought both individually and derivatively on behalf of FASC. (*See* Compl. ¶¶ 12–146.)[8]

21. The claims for relief asserted in the Complaint included the following: breach of contract/breach of implied covenant of good faith and fair dealing against CCHS and CFVASC; tortious interference with a contractual relationship against SCA and NSC; tortious interference with a contractual relationship (pled in the alternative) against CCHS; breach of contract against CFVASC; civil conspiracy against NSC, SCA, and CCHS; breach of fiduciary duty against CFVASC; tortious interference with a contractual relationship against SCA; breach of fiduciary duty and constructive fraud against SCA and CFVASC; and declaratory judgment against CCHS, NSC, SCA, and CFVASC. (Compl. ¶¶ 12–146.)

22. By virtue of a combination of rulings by the Court and voluntary dismissals of claims by Woodcock, the only remaining causes of action are derivative claims for (1) breach of contract/breach of the implied covenant of good faith and fair dealing against CCHS and CFVASC; (2) breach of fiduciary duty against CFVASC; and (3) declaratory judgment.[9]

---

[7] FASC was named as a nominal Defendant.

[8] As noted above, on 19 September 2022, Plaintiffs Wadon, Wahbeh, and Demetri voluntarily dismissed their individual claims and withdrew from the prosecution of the derivative claims, leaving Woodcock as the sole remaining Plaintiff in this action. (ECF No. 108.)

[9] At the 4 October 2023 hearing on the pending Motions, Woodcock's counsel informed the Court that Woodcock is no longer pursuing his derivative claim for tortious interference with contract against CCHS.

23. On 15 May 2023, the parties filed cross-Motions for Summary Judgment. In their motion, Defendants sought summary judgment on all of Woodcock's remaining claims. Woodcock seeks summary judgment in his favor solely as to his claim for breach of contract.

24. At the conclusion of briefing on the cross-Motions, Defendants filed a Motion to Strike and then an Amended Motion to Strike in which they have asked the Court to strike certain exhibits filed by Woodcock and various statements contained in his briefs.

25. The Court held a hearing on the Motions on 4 October 2023, and they are now ripe for resolution.

**LEGAL STANDARD**

26. 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(c)). "[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) (cleaned up).

27. 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).

28. 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). "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)).

29. When a party requests offensive summary judgment on its own claims for relief, "a greater burden must be met." *Brooks v. Mt. Airy Rainbow Farms Ctr., Inc.*, 48 N.C. App. 726, 728 (1980). The moving party "must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard

that must be applied to the facts by the jury." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985). For that reason, it is "rarely . . . proper to enter summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984).

## ANALYSIS

### I. Cross Motions for Summary Judgment

#### A. Breach of Contract/Breach of the Implied Covenant of Good Faith and Fair Dealing

30. As discussed in more detail below, Woodcock's breach of contract claim is premised on his contention that the April 2019 Transactions breached certain provisions of the LPA—namely, provisions seeking to (1) prevent a Limited Partner (or its successor in interest) from obtaining significant control over the General Partner; and (2) preclude the General Partner (or an affiliated entity) from competing with FASC.

31. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of the contract." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 2018 NCBC LEXIS 42, at *30 (N.C. Super. Ct. May 8, 2018) (cleaned up), *aff'd per curiam*, 372 N.C. 260 (2019).

32. The essence of Woodcock's arguments in this case is his contention that the April 2019 Transactions violated Sections 15.9 and 14.5 of the LPA. The Court will discuss each in turn.

##### 1. Section 15.9

33. Section 15.9 of the LPA provides as follows:

> Anything contained herein to the contrary notwithstanding, no Partner (or successor in interest of any Partner) may voluntarily or involuntarily assign, transfer, pledge, hypothecate or make any other disposition of the whole or any part of his Units in the Partnership, and no purported transfer, assignment, pledge, hypothecation or other disposition of any Units or other interest in the Partnership (whether or not such assignee or transferee becomes a substituted Limited Partner) shall be effective *if it would result in the Limited Partners (or any successor in interest of the Limited Partners) owning, directly or indirectly, individually or in the aggregate, more than 20% of the stock or other equity interest of the General Partner or any Affiliates of the General Partner* as discussed in Section 13.4 hereof.

(LPA § 15.9 (emphasis added).)[10]

34. Subpart (1) of the LPA's Definitions section defines the term "Affiliate" as "any corporation, partnership, trust or other entity controlling, controlled by or under direct or indirect common control with such entity or in which such entity holds 10% or more of the outstanding voting or equity interests." (LPA, at 1.)

35. Woodcock argues that Section 15.9 prevented CCHS, as a Limited Partner or as a successor in interest to a Limited Partner, from acquiring more than 20% of the equity interest of the General Partner—CFVASC.

36. However, Woodcock's argument lacks merit. As an initial matter, once the Contribution Agreement was executed, CCHS had divested itself of the LP Units it formerly owned by transferring them to CFVASC.[11] As a result, CCHS was no

[10] Section 13.4 of the LPA, which is referenced in Section 15.9, does not contain any additional substantive provisions relevant to interpreting Section 15.9.

[11] The Court observes that Section 15.3 of the LPA expressly permits a Limited Partner to convey its LP Units to the General Partner.

longer a Limited Partner of FASC at the time it acquired the equity of CFVASC pursuant to the E.P.A. Rather, it was a *former* Limited Partner.[12]

37. Woodcock appears to focus his argument regarding Section 15.9 on his contention that CCHS should be deemed a successor in interest of a Limited Partner by virtue of its acquisition of CFVASC's equity. Specifically, he asserts that, as a result of the E.P.A., CCHS became the owner—albeit the *indirect* owner—of the LP Units belonging to CFVASC, thereby making CCHS a successor in interest of the LP Units that CCHS had itself previously transferred to CFVASC pursuant to the Contribution Agreement. However, Woodcock's argument—in addition to being somewhat circular—is not based on a proper application of North Carolina law.

38. This Court has previously stated the following on this subject:

> North Carolina courts have "defined the term 'successor' to mean [o]ne that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the part of another by succession." *Terres Bend Homeowners Assoc. v. Overcash*, 185 N.C. App. 45, 51, 647 S.E.2d 465, 470 (2007) (alteration in original) (quoting *Rosi v. McCoy*, 319 N.C. 589, 593, 356 S.E.2d 568, 570 (1987)).
>
> . . .
>
> Moreover, because a "successor" by definition stands in the shoes of his predecessor, a "successor" cannot succeed to rights that his predecessor did not have. *See* Black's Law Dictionary at 1473 ("A successor in interest retains the same rights as the original owner, with no change in substance.")[.]

*TaiDoc Tech. Corp. v. OK Biotech Co.*, 2015 NCBC LEXIS 74, at **14–16 (N.C. Super. Ct. July 17, 2015).

[12] Woodcock's counsel conceded this point at the 4 October hearing.

39. Woodcock's "successor in interest" argument fails to come to grip with the fact that the E.P.A. did not confer upon CCHS *direct* ownership over the contributed LP Units. Woodcock asserts that, as a practical matter, CCHS was able to exercise authority over CFVASC's LP Units once the E.P.A. was signed. But even if that is true, it does not suffice to show a violation of Section 15.9. This Court rejected a similar argument in *Willard v. Barger*, 2019 NCBC LEXIS 33 (N.C. Super. Ct. May 29, 2019).

> The Estate pleads that BW is an entity separate and distinct from the Estate. *The Estate's ownership of BW's shares may give the Estate the practical ability to control BW's affairs, including the disposition of BW's assets, but ownership in BW's shares does not equate to direct ownership in BW's assets.* Thus, the Estate has no direct ownership interest in the 2014 Subaru, and without ownership in the Estate, the Estate has no legal right to recover the 2014 Subaru for the Estate.

*Id*. at *6 (emphasis added). *See also Global Textile All., Inc. v. TDI Worldwide, LLC*, 375 N.C. 72, 76 (2020) ("[A] corporation is an entity distinct from the shareholders which own it. Even a corporation owned by a single individual is a distinct entity from its shareholder." (cleaned up)); *Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 67 (2003) ("A corporation is treated as an entity separate from its stockholder or stockholders under all ordinary circumstances.").

40. Both immediately before and after the E.P.A. was executed, CFVASC remained the direct legal owner of the contributed LP Units. Accordingly, CCHS cannot be said to have "stepped into the shoes" of CFVASC as to their ownership or to have otherwise become a successor in interest to a Limited Partner.

41. Thus, the Court concludes that the April 2019 Transactions did not violate Section 15.9 of the LPA.

**2. Section 14.5**

42. Woodcock also contends that the April 2019 Transactions violated Section 14.5 of the LPA, which states in pertinent part as follows:

> This Agreement shall not preclude or limit, in any respect, the right of the General Partner or any Affiliate of the General Partner or any partner, owner, officer or director of the General Partner or any Affiliate to engage or invest in any business activity of any nature or description, including those which may be the same as or similar to the Partnership's business and in direct competition therewith. Any such activity may be engaged in independently or with others, and may include, but not be limited to, the ownership and/or operation of other surgical centers or related medical facilities for the General Partner's or any such Affiliate's, partner's, owner's, officer's or director's own account or the account of others, including any partnership or other entity organized by the General Partner or any such Affiliate, partner, owner, officer or director. Neither the Partnership nor any Partner shall have any right, by virtue of this Agreement or the Partnership relationship created hereby, in or to such other ventures or activities, or to the income or proceeds derived therefrom, and the pursuit of such ventures, even if competitive with the business of the Partnership, shall not be deemed wrongful or improper. The General Partner or any Affiliate or any officer or director of the General Partner or any Affiliate shall have the right to take from for its own account (individually or as a trustee) or to recommend to others any investment opportunity. *Notwithstanding the foregoing, neither the General Partner nor any Affiliate of the General Partner, nor any partner, owner, officer or director of the General Partner or any Affiliate of the General Partner may engage in the business of or invest in a surgical center or related medical facility (a "Competitive Facility") if such Competitive Facility maintains a place of business in, or derives more than 5% of its patients from, Cumberland County, North Carolina or any other county in the state of North Carolina from which the Partnership is then currently deriving more than 5% of its patients (the "Restricted Area").* Any opportunity to invest in a Competitive Facility in the Restricted Area shall be considered as an investment opportunity within the scope and purposes of the Partnership, and the General Partner or its Affiliate or the partner, owner, officer or director of the General Partner or its Affiliate who has identified such

> opportunity shall either refrain from making an investment in such Competitive Facility or shall first disclose to the Partners in reasonable detail the material terms of such investment opportunity and offer such opportunity for pursuit and exploitation by the Partnership and, unless such opportunity is declined by a Majority in Interest of the Partners, such activity shall not be pursued and, in the event of the pursuance of such venture in violation of this requirement, all income or other proceeds derived therefrom by the General Partner or its Affiliates or any partner, owner, officer or director of the General Partner or its Affiliates shall be deemed to be held in constructive trust for the benefit of the Partnership and its Partners until the same shall be paid over to the Partnership.

(LPA § 14.5 (emphasis added).)

43. In support of this argument, Woodcock asserts that (1) FASC and CCHS are competitors in the Cumberland County market for outpatient surgical procedures; and (2) by virtue of the E.P.A., CCHS became an Affiliate of the General Partner, meaning that it was not permitted to compete against FASC by engaging in the business of a Competitive Facility (as that term is defined in Section 14.5).

44. In response, Defendants make two arguments. First, they contend that the hospitals they operate in Cumberland County do not compete with ASCs such as FASC due to the numerous differences that exist between hospitals and ASCs. Second, in the alternative, Defendants assert that even if a violation of Section 14.5 did occur, a retroactive ratification of the April 2019 Transactions took place by means of an Amendment and Consent Agreement ("A&C") that was executed in 2022 with the consent of the General Partner and two-thirds in interest of the Limited Partners of FASC. The Court will address each argument in turn.

45. With regard to Defendants' first argument, it is undisputed that (1) FASC operates an ASC in Cumberland County; (2) at all relevant times CCHS has

owned and operated hospitals in Cumberland County where both in-patient and out-patient surgeries were performed; and (3) by virtue of the E.P.A., CCHS became an "Affiliate" of FASC's General Partner.

46. The parties disagree, however, on whether CCHS—through the operation of its hospitals—maintains a "Competitive Facility" for purposes of Section 14.5. The Definitions section of the LPA provides no further guidance as it simply states that " 'Competitive Facility' shall be as defined in Section 14.5 hereof." (LPA, at 2.)

47. Thus, the only definition of the term comes from the text of Section 14.5—that is, the statement that a "Competitive Facility" refers to "a surgical center or related medical facility."

48. Not surprisingly, the parties take very different positions as to how that definition should be applied here. Defendants point to the existence of numerous differences between hospitals and ASCs and emphasize that certain types of services can be provided to patients only in hospitals and not in ASCs. In response, Woodcock argues that both FASC and CCHS (through its hospitals) perform outpatient surgeries in Cumberland County and therefore compete for patients in need of such procedures. Woodcock also contends that FASC and CCHS possess the only operating rooms in Cumberland County available for surgical procedures on patients who are not eligible to be treated at military veterans' hospitals.

49. The Court is skeptical of Defendants' argument that a hospital can never be deemed to qualify as a "surgical center or related medical facility." Their

contention appears to rely on the assumption that, in order for the LPA's definition of "Competitive Facility" to be satisfied, the two entities in question must be alike in all respects, which is not supported by the wording in Section 14.5. To be sure, differences exist between hospitals and ASCs, but the record supports Woodcock's argument that outpatient surgeries were performed in Cumberland County during the relevant time period at both FASC and CCHS' hospitals.

50. For these reasons, if this were Defendants' only argument regarding Section 14.5, then they would not be entitled to summary judgment. However, the Court finds merit in Defendants' alternative argument that even assuming the April 2019 Transactions violated Section 14.5, any such violation was cured by the execution of the A&C.

51. Woodcock, as discussed below, challenges the validity of the A&C. At the 4 October hearing, however, his attorney conceded that if the Court finds the A&C to have been validly adopted, such a ruling would entitle Defendants to summary judgment as to all of his remaining claims.

52. The A&C, which was signed by CFVASC and VASA on 11 January 2022, stated in relevant part as follows:

> WHEREAS, Section 19.1 of the LPA states that the LPA may be modified or amended at any time by a writing signed by the General Partner and by Two-Thirds in Interest of the Limited Partners, subject to certain restrictions not applicable to this Agreement;
>
> WHEREAS, Section 14.3 of the LPA provides that certain actions may not be taken by FASC, or by the General Partner on behalf of FASC, without the approval of either Two-Thirds in Interest of the Limited Partners or a Majority in Interest of the Limited Partners;

WHEREAS, (a) CFVASC holds 43.6574805% of the Limited Partner Units of FASC and (b) VASA holds 46.0629789% of the Limited Partner Units of FASC and therefore, CFVASC and VASA collectively represent "Two-Thirds in Interest of the Limited Partners" and a "Majority in Interest of the Limited Partners", as such terms are defined in the LPA;

WHEREAS, consistent with the LPA, on April 1, 2019 (the "**Closing Date**"), Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System ("CFVHS") and CFVASC entered into a Contribution Agreement, pursuant to which CFVHS contributed all of the Limited Partner Units in FASC then held by CFVHS (constituting 39.2472388% of the Limited Partner Units of FASC) to CFVASC (the "**Contribution**"), contingent on the closing of the Equity Purchase;

WHEREAS, immediately following the Contribution, on April 1, 2019, CFVHS, as permitted under the LPA, purchased from National Surgery Centers, LLC, a Delaware limited liability company (the "**Seller**"), all of the equity interests of CFVASC (the "**Equity Purchase**" and, together with the Contribution, the "**Transaction**");

WHEREAS, after the closing of the Transaction, CFVASC continued to be the General Partner of FASC, and CFVHS became the direct owner of all of the equity of CFVASC and therefore became an Affiliate of CFVASC; and

WHEREAS, in connection with the Transaction, and for the avoidance of any doubt, the Parties desire to (a) confirm that there have been no violations of Section 14.5 or 15.13 of the LPA, (b) amend the LPA in accordance with the terms and conditions of the LPA, and (c) approve the Transaction with respect to FASC, in each case, as further set forth below; and

NOW, THEREFORE, in consideration of the premises set forth above, which are incorporated in this Agreement as if fully set forth below, and the representations, warranties, covenants and agreements contained in this Agreement, and intending to be legally bound hereby, the Parties agree as follows:

Section 1. *Good Standing; No Violations under Section 14.5 or 15.13 of the LPA*. *Each of the Parties, on behalf of itself and its successors and assigns and their respective representatives, hereby absolutely, unconditionally and irrevocably confirms that, as of the Effective Date and retroactive beginning on April 1, 2018, (a) all of the Parties and their Affiliates that are Partners (and, to the extent applicable prior to the*

*Effective Date, including as a prior Limited Partner, CFVHS) are in good standing under the LPA and (b) none of the Parties and their Affiliates that are Partners (and, to the extent applicable prior to the Effective Date, including as a prior Limited Partner or an Affiliate of CFVASC, CFVHS) are now, nor have they previously been, in violation or breach of Section 14.5 or 15.13 of the LPA.*

Section 2. Amendments to the LPA. The following amendments shall apply retroactively beginning on April 1, 2018.

(a) Section 14.5 of the LPA is hereby amended and restated in its entirety to read as follows:

**Section 14.5**

(a) This Agreement shall not prohibit, preclude, restrict or limit, in any respect, the right of the General Partner, its Affiliates or their respective partners, owners, officers, directors and managers (collectively, the "GP Parties") to engage or invest in any business activity of any nature or description, including, without limitation, those which may be the same as or similar to the Partnership's business and in direct competition therewith. Any such activity may be engaged in independently or with others, and may include, without limitation, the ownership and/or operation of other surgical centers or related medical facilities for any GP Party's own account or the account of others, including any entity organized by any GP Party. Neither the Partnership nor any Partner have any right, by virtue of this Agreement or the Partnership relationship created hereby, in or to such other ventures or activities, or to the income or proceeds derived therefrom, and the pursuit of such ventures, even if competitive with the business of the Partnership, shall not be deemed wrongful or improper. Each GP Party shall have the right to take for its own account (individually or as a trustee) or to recommend to others any investment opportunity.

(b) Notwithstanding the foregoing, no GP Party may engage in the business of, or invest in, a free-standing ambulatory surgery center (a "Competitive Facility") if such Competitive Facility maintains a place of business in, or derives more than five percent (5%) of its patients

from Cumberland County, North Carolina or any other county in the State of North Carolina from which the Partnership then currently derives more than five percent (5%) of its patients, calculated on an annualized basis over the immediately preceding 12-month period (the "Restricted Area"); *provided, however, that no full-service hospital and/or health system owned, operated or managed by CFVHS or any of its Affiliates prior to, on or after the date hereof (including as applicable, without limitation, Harnett Health System, Inc., Betsy Johnson Hospital in Harnett County, NC, Bladen County Hospital, Hoke Hospital, and their respective Affiliates) shall constitute a Competitive Facility.*

. . .

(b) Section 15.13 of the LPA is hereby amended and restated in its entirety to read as follows:

**Section 15.13**

. . .

(e) *Notwithstanding anything contained in this Agreement to the contrary, nothing in Section 14.5 or in this Section 15.13 shall prohibit, preclude, restrict or limit (i) CFVHS or any of its Affiliates from directly or indirectly operating, managing or owning those full-service hospitals and/or health systems which it (A) operated, managed or owned, as the case may be, prior to or as of April 1, 2019 or (B) subsequently operates, manages or owns, as the case may be, at any time after April 1, 2019 or* (ii) any Partner from owning, as a passive investment, up to one percent (1%) of the equity securities of any Person in competition with the Partnership, which securities are listed on any national securities exchange, as long as such Partner has no other business relationship, direct or indirect, with the issuer of such securities.

. . .

Section 3. Consent, Ratification and Approval of the Transaction. *For the avoidance of any doubt, the Parties hereby consent to, approve, ratify and confirm the execution and delivery of any agreements, documents and certificates to which FASC is a party or may*

*be bound with respect to the Transaction (together with the Contribution Agreement and Equity Purchase Agreement governing the Transaction, the "**Transaction Documents**") and the consummation of the transactions contemplated thereby (including the Transaction).*

. . .

Section 4. Waiver and Release. For the good and valuable consideration set forth in this Agreement, which is hereby acknowledged, VASA, for itself, on behalf of its shareholders, and in its capacity as a limited partner of FASC, agrees as follows:

(x) That any and all claims, rights, remedies, or damages, whether at law or in equity, of any kind or nature whatsoever, whether known or unknown, whether in contract, tort, equity or otherwise, and whether arising from conduct occurring prior to or at the Effective Date, that it or they may have against CFVASC and/or its respective subsidiaries, parents, successors and assigns and any of their respective officers, directors, managers, employees, agents, counsel, representatives or advisors (the "**Released Parties**") with respect to any matter (i) occurring prior to or at the Effective Date relating to Sections 14.5 (Powers, Rights and Duties of the General Partner) or 15.13 (Transfer of Interests by Partners) of the LPA or (ii) in any way relating to the Transaction or arising in connection with the Transaction, are hereby fully, unconditionally, irrevocably and forever waived, released and discharged (the "**Released Actions**").

(A&C, at 1–5 (emphasis added), ECF No. 173.10.)

53. As recognized by a leading North Carolina treatise on commercial law, "[s]ometimes an improper act or transaction that is the basis of a derivative claim can be cured retroactively by ratification[.]" 1 Robinson on N.C. Corp. Law § 17.07; *see also Holland v. Warren*, 2020 NCBC LEXIS 146 (N.C. Super. Ct. Dec. 15, 2020) (allowing retroactive ratification of transaction by board of directors of a non-profit property owners' association); *Michelson v. Duncan*, 407 A.2d 211, 219 (Del. 1979) ("It is the law of Delaware, and general corporate law, that a validly accomplished

shareholder ratification relates back to cure otherwise unauthorized acts of officers and directors.").

54. Although there are substantive limits to the ratification doctrine, Woodcock does not argue that any of these limitations are applicable here. Instead, his sole argument lies with the *manner* in which the A&C was adopted. Accordingly, the Court will only address this argument.

55. At a meeting of VASA shareholders on 3 January 2022, a majority of the shareholders voted in favor of adopting the A&C. (Lowe Aff. ¶¶ 7, 9.) Subsequently, on 11 January 2022, the A&C was formally executed by VASA and CFVASC.[13] (A&C; Weatherly Aff. ¶ 33; Lowe Aff. ¶ 10.)

56. Woodcock's only argument as to the invalidity of the A&C is based on his contention that the procedure set out in Section 19.6 of the LPA was not followed with regard to the A&C's adoption. Defendants, conversely, contend that the only provision in the LPA triggered by the adoption of the A&C was Section 19.1, which was satisfied.

57. The relevant portion of Section 19.1 reads as follows:

> This agreement may be modified or amended at any time by a writing signed by the General Partner and by Two-Thirds in Interest of the Limited Partners . . .

(LPA § 19.1.)

58. Section 19.6 states the following:

---

[13] CCHS also signed the A&C "for the sole, limited purpose of agreeing that FASC shall be classified as a Tier 1 in-network facility for purposes of CCHS's self-insured health plan covering CCHS employees and dependents." (Weatherly Aff. ¶ 33.)

> Any consent or approval of a Limited Partner required by this Agreement may be given as follows:
>
> (a) By a written consent given by the consenting Limited Partner and received by the General Partner at or prior to the doing of the act or thing for which the consent is solicited; or
>
> (b) By the affirmative vote by the consenting Limited Partner to the doing of the act or thing for which the consent is solicited at any meeting called pursuant to Section 19.4 or Section 19.5 to consider the doing of such act or thing.

(LPA § 19.6.)

59. Defendants argue that the execution of the A&C complied with Section 19.1 because the A&C "is in fact a 'writing signed by' CFVASC, in its capacity as General Partner, and by both VASA and CFVASC in their capacities as Limited Partners. As noted, VASA and CFVASC together represent Two-Thirds in Interest of the Limited Partners." (Defs.' Br. Supp. Mot. Summ. J., at 18, ECF No. 172.)

60. In response, Woodcock asserts that Sections 19.1 and 19.6 must be read together and that the above-described process by which the A&C came into existence was not in compliance with Section 19.6.

61. As an initial matter, the Court finds that Woodcock has failed to show how Section 19.1 was violated in connection with the A&C's adoption. However, by its plain terms, Section 19.1 only applies to modifications and amendments of the LPA. Although Defendants contend that the A&C effectuated an amendment to Section 14.5, they further assert that the A&C additionally served as a ratification of the April 2019 Transactions and as a waiver of any claims arising therefrom. For

this reason, it is necessary to examine other provisions of the LPA in addition to Section 19.1.

62. Although the parties do not focus their arguments on this section, the Court notes that Section 14.3(j) of the LPA states as follows:

> In addition to other acts expressly prohibited or restricted by this Agreement or by the Partnership Act, and in order to eliminate or limit any actual or potential conflicts of interest between the General Partner and the Partnership or the Limited Partners, the General Partner shall have no authority to make any decision or take any action to act on behalf of the Partnership with respect to any of the following matters unless such decision or action within the scope of the following matters has been approved in writing by Two-Thirds in Interest of the Limited Partners:
>
> . . .
>
> (j) Doing any act in contravention of this Agreement . . .

(LPA § 14.3(j).)

63. Although neither subpart (j) nor any other subpart of Section 14.3 expressly deal with retroactive ratifications of acts that violate the LPA, Section 14.3's introductory paragraph lends further support to the proposition that approval in writing by Two-Thirds in Interest of the Limited Partners is all that is needed for the General Partner to take such action. Woodcock does not dispute the fact that such written approval existed with regard to the A&C's adoption.

64. Moreover, to the extent that Section 19.6 is, in fact, applicable and that its provisions should be construed as mandatory rather than merely permissive,[14] it appears that subpart (a) of that section was, in fact, satisfied.

---

[14] Defendants argue that because Section 19.6 uses the word "may" rather than the word "shall," its provisions are merely permissive examples of how the consent or approval of a

65. Subpart (a) of Section 19.6 states that consent or approval of a Limited Partner may be effectuated "[b]y a written consent given by the consenting Limited Partner and received by the General Partner at or prior to the doing of the act or thing for which the consent is solicited[.]" (LPA § 19.6(a).)

66. Woodcock does not dispute the fact that the A&C qualifies as a "written consent" given by the consenting Limited Partners and received by the General Partner. Instead, he argues that subpart (a) does not allow for the sort of retroactive effect that Defendants sought to achieve by adopting the A&C. He contends that the phrase "at or prior to the doing of the act or thing for which the consent is solicited" is limited only to prospective acts as opposed to backward-looking retroactive acts. Thus, according to Woodcock, the "act or thing for which the consent [wa]s [being] solicited" had already occurred back in April of 2019—that is, the April 2019 Transactions.

67. The Court is unable to agree with Woodcock's argument. The better interpretation is that "the act or thing for which the consent [wa]s [being] solicited" was the *future* act of adopting the A&C (regardless of the fact that the effect of the A&C's adoption would be to provide retroactive relief). Thus, even assuming

---

Limited Partner could be given rather than the *exclusive* mechanisms for obtaining such approval. It is true that the word "may" is typically construed as being merely permissive rather than mandatory. *See, e.g., Campbell v. First Baptist Church*, 298 N.C. 476, 483 (1979) ("[T]he use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act."). Woodcock, conversely, argues that when read contextually, Section 19.6 should be interpreted as setting out the only valid ways in which such consent or approval can be given by a Limited Partner. However, even assuming *arguendo* that Woodcock is correct on this point, the Court is satisfied that—as explained below—the A&C's adoption satisfied subpart (a) of Section 19.6.

compliance with Section 19.6 was necessary, the Court rejects Woodcock's sole argument as to why subpart (a) was not satisfied.

68. The Court has carefully considered Woodcock's remaining arguments and finds them to be without merit.

69. For these reasons, Defendants' Motion for Summary Judgment is **GRANTED** as to Woodcock's breach of contract claim, and Woodcock's motion for summary judgment as to that claim is **DENIED**.

### 3. Breach of the Implied Covenant of Good Faith and Fair Dealing

70. Defendants are likewise entitled to summary judgment on Woodcock's accompanying claim for breach of the implied covenant of good faith and fair dealing.

71. All contracts contain an implied covenant of good faith and fair dealing that places a duty on the parties to "act in good faith and to make reasonable efforts to perform [their] obligations under the agreement." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56 (2005). "To state a valid claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must plead that the party charged took action which injured the right of the other to receive the benefits of the agreement, thus depriving the other of the fruits of the bargain." *Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, 255 N.C. App. 236, 253 (2017) (cleaned up).

72. In *Cordaro v. Harrington Bank*, our Court of Appeals stated the following regarding the effect of the dismissal of an underlying breach of contract

claim on an accompanying claim for breach of the implied covenant of good faith and fair dealing:

> The invalidity of Cordaro's breach of contract claim on these facts is likewise fatal to his claim for breach of the implied covenant of good faith and fair dealing. Under North Carolina law, every contract contains "an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation and quotation marks omitted).
>
> . . .
>
> As a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as its claim for breach of contract, we treat the former claim as "part and parcel" of the latter. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997); *see Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 ("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012).
>
> Here, the basis for Cordaro's claim that Harrington breached the implied covenant of good faith and fair dealing is identical to the basis for his breach of contract claim. Therefore, the trial court properly dismissed this claim as well.

*Cordaro v. Harrington Bank*, FSB, 260 N.C. App. 26, 38–39 (2018).

73. Accordingly, because Woodcock's claim for breach of the implied covenant of good faith and fair dealing is based on the same acts as his claim for breach of contract, Defendants' Motion for Summary Judgment is **GRANTED** as to Woodcock's claim for breach of the implied covenant of good faith and fair dealing, and Woodcock's summary judgment motion as to that claim is **DENIED**.

### B. Breach of Fiduciary Duty Claim

74. Woodcock also asserts a breach of fiduciary duty claim against CFVASC.

75. It is well-settled that "[t]o establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of the injury to the plaintiff." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 339 (2019).

76. However, this claim is—as Woodcock's counsel has conceded—based on the premise that the April 2019 Transactions resulted in a breach of the LPA, which this Court has now rejected. Accordingly, the Court **GRANTS** Defendants' summary judgment motion on this claim as well.

### C. Declaratory Judgment Claim

77. Finally, Woodcock has asserted a declaratory judgment claim seeking a declaration from the Court that CCHS does not have lawful authority to own 100% of the equity of FASC's General Partner or to exercise any authority over the General Partner based on the alleged invalidity of the April 2019 Transactions.

78. In light of the Court's entry of summary judgment in favor of Defendants on Woodcock's breach of contract claim, Defendants' Motion for Summary Judgment is likewise **GRANTED** as to this claim.

## II. Motion to Strike

79. Finally, Defendants request that the Court strike certain exhibits filed by Woodcock and various statements contained in Woodcock's Memorandum of Law

in Opposition to Defendants' Motion for Summary Judgment, (ECF No. 183) on the ground that they "are irrelevant and would not be admissible in evidence." (Mot. Strike, at 1–2.)

80. However, because the Court has granted summary judgment for Defendants on all of Woodcock's remaining claims, the Motion to Strike is **DENIED** as moot.

## CONCLUSION

**THEREFORE, IT IS ORDERED** as follows:

1. Defendants' Motion for Summary judgment is **GRANTED**;

2. Woodcock's Motion for Summary Judgment is **DENIED**; and

3. Defendants' Amended Motion to Strike is **DENIED** as moot.

**SO ORDERED**, this the 18th day of October, 2023.[15]

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

[15] This Order and Opinion was originally filed under seal on 18 October 2023. This public version of the Order and Opinion is being filed on 24 October 2023. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order and Opinion as 18 October 2023.